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## JUDICIAL ROLE AND JUDICIAL IMAGE\*

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Some months ago, already looking forward eagerly to the honor and opportunity of delivering this Owen J. Roberts Memorial Lecture, I happened to see and to turn the pages of a rare book. It had been compiled during the Elizabethan period and was entitled *Ordinarie Book*. Today we might call its contents a miscellaneous correspondence file. At any rate it was a compilation, laboriously copied by hand, of letters on various subjects written by different persons and addressed to Lord Cooke while he was a legal luminary—sometime Attorney General, later Lord Chief Justice—of England.<sup>1</sup>

In one letter the writer begins by identifying himself modestly as a “poore simple man,” writing, as he says, to the Chief Justice “from Love and a true desire to doe yow good.” Having thus stated his kindly motivation, the writer counseled the distinguished jurist as follows:

First therefore behold your errors, in discourse yow delight to speake too much; . . . this some say becomes a pleader; . . . [but not a] Judge . . . [Y]ow having a living fruitful mind should not so much labour what to speake as to find what to leave unspoken; rich soyles are often to bee

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<sup>1</sup> The volume is an item in the collection of rare Elizabethan books in the Folger Shakespeare Library in Washington, D.C. The letter from which a passage is quoted begins at page 765.

weeded. Secondly you cloye your auditorie [bore your listeners?] . . . speach must either bee sweet or short.

At another place the "poore simple man" flatters his Lordship: ". . . while you speake in your own Element the lawe noe man ordinarye equalls yow," only to deflate him more effectively in what follows: "but when yow wander (as yow often delight to doe) yow then wander indeed, and never give such satisfaction as the Curious tyme requires . . ."

There it was, as good a guide for a judge on the lecture platform today as it was in 1600. Stick to "your owne Element, the law," make it "sweet or short," and don't "cloye the auditorie"!

Heeding at least the "poore simple" man's first admonition, it is my thought tonight to make some basic, if unoriginal, observations about the judge's assigned role, to relate this role and other circumstances to the hurtfully unfavorable image of the judiciary that now seems to be prevalent and to suggest some constructive things that can be done in this regard by an informed and concerned public, by judges themselves and by lawyers and others who influence the selection of judges, all to the end that the administration of justice shall become more respected and more effective.

## I. THE CRISIS OF CONFIDENCE IN THE JUDICIAL SYSTEM

Because of the nature of our work and our training we of the legal profession—whether practitioners, educators, judges or individuals otherwise engaged in legal undertakings—are committed to the enterprise of making the legal order work, and hopefully work better. We understand and are professionally dedicated to the rule of law and to the effective functioning of the judiciary as authoritative ministers of the legal order.

Therefore, it was in our ears that the alarm must have sounded loudest when the Chief Justice of the United States began his address to the 1972 Annual Meeting of the American Bar Association by citing with grave concern "what has been called a crisis of confidence in the judicial system."<sup>2</sup> There can be no doubt that courts today are under unusually severe attack from many sources and for various reasons. It is more popular to condemn the courts than to support them. It is hard to imagine a politician in the 1970's echoing an extravagant campaign statement made more than 60 years ago by William Howard Taft, then the Republican candidate for the Presidency of the United States: "I love judges, and I love courts. They are my ideals, that typ-

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<sup>2</sup> Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049 (1972).

ify on earth what we shall meet hereafter in heaven under a just God."<sup>3</sup>

Today's judges laugh, I hope, at such extravagant praise. Perhaps, like tobacco, it may do little harm if one does not inhale. But, at the other extreme, widespread and long continued denunciations and manifestations of lack of confidence in the judiciary can have catastrophic consequences for the functioning of our society. So at a time like this we must ask ourselves: Why are we experiencing an erosion of public confidence in the courts? What harm is likely to result? Are many who condemn the courts misguided in what they expect or demand of them? To the extent that the judicial role is misunderstood, how can better understanding be achieved? Are judges themselves and others who share responsibility for selecting judges and creating the public image of courts remiss in failing to act in proper ways that will tend to establish and maintain public confidence?

With these questions in mind, and others that they suggest, it may be useful to restate and briefly discuss the role of the judge in our polity. There will be little that is new in what I shall say: no fresh insight or discovery, no learned commentary on the work product of the courts such as is familiar to and certainly appropriate on such an occasion as this. Yet, I have dared believe that a simple, hopefully not simplistic, discussion of matters of fundamental importance is not unworthy of this occasion. Confidence in that belief is enhanced by remembrance that far along in a lifetime of devotion to scholarly legal investigation and analysis Mr. Justice Holmes could say: "[I]t seems to me at this time that we need education in the obvious more than investigation of the obscure."<sup>4</sup>

People living in the uncomplicated rural society that was early America were likely to choose such an individual as the village blacksmith or the proprietor of the country store to be the local judge. It was deemed necessary and sufficient for the administration of justice that the magistrate be a well known person who was trusted for his integrity, common sense, sober judgment and impartiality. Indeed, as recently as twenty-five years ago, the Constitution of New Jersey attempted not very successfully to exalt these extraprofessional qualifications by requiring that its large and cumbersome court of last resort should include six members who were not lawyers. Of course we now agree that the complexities of the formal legal order in modern society

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<sup>3</sup> Reported in Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1311 n.58 (1937).

<sup>4</sup> O.W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 292-93 (1920).

make it essential that judges at all levels be, as we say, "learned in the law." But this added requirement is not in derogation of the verity that John Adams formalized in Article 29 of the Massachusetts Declaration of Rights: "It is the right of every citizen to be tried by judges who are free, impartial and independent as the lot of humanity will admit."

The need for such a judiciary exists in any society that has advanced to the stage of settling private disputes by magisterial decision rather than by combat or some other trial of strength between disputants. But the need for an able, independent and impartial judiciary is greatest in a polity like ours, where the doctrine of judicial supremacy obtains. For under our system, it is not merely the ordinary disputes among private citizens that judges are empowered to settle. In exercise of independent judgment on constitutional issues, they must at times impose decisions that thwart the popular will of the moment, or invalidate laws passed by elected legislatures, or issue a firm "Thou shalt not!" to popularly elected representatives of the people, be they Governors, or Mayors, or even the President of the United States. Lawyers will remember that in the celebrated steel strike case, the Supreme Court found it necessary to nullify a far reaching and well intended Executive Order of the President of the United States.<sup>5</sup>

To state the matter differently, in the performance of their responsibility to administer justice according to law the courts are not intended to be and do not function as democratic institutions, or as mouthpieces for the popular will. As Justice Frankfurter has reminded us, "the [judicial] power is oligarchic . . . [and] it is not saved from being so because it professes to act in furtherance of human ends." Functionally, the popular or the democratic branches, the executive and the legislative, may be viewed as providing government with drive, while the oligarchic courts provide braking power. This is true even though judicial restraint on governmental movement in one direction may perforce provide a powerful stimulus to movement in another. But primarily the courts do not serve to make our society run. Rather they serve to prevent it from running wild.

## II. THE JUDICIARY IN AN ADVERSARY ENVIRONMENT

Moreover, adversary litigation, whether involving government or only private individuals, always has two sides. So the courts must decide against half of those who contest lawsuits. And, inevitably, there will be losers and their partisans who inveigh against the courts.

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<sup>5</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

If such condemners have reason to believe that decision has reflected bias or outside pressure or influence, outspoken denunciation is indeed called for. But too often denunciation has no more basis than the outrage of baseball players and fans who want the umpire to call all close plays in favor of the home team. How often, one wonders, do those who condemn the courts want judges to be, to the best of their ability, fair and impartial, rather than to share the detractor's bias?

To say this is not to disapprove or discourage principled criticism. For men and women in black robes, no different from those who work in less sombre attire, make mistakes. Judges must constantly try to avoid relying upon dubious presuppositions and unsound analysis, but they cannot always succeed. Thus, principled criticism serves as an invaluable corrective of otherwise unrealized error. But such criticism is quite different from outcry against the courts by those who seek to make them partisan; whether pro-management or pro-labor, pro-prosecution or pro-defense, pro-government or pro-private citizen, pro-injured party or pro-insurer. Any attempt to make the courts partisan, or to cause the public to want partisan decisions, is, at best, a misconception of the judicial role and, at worst, an effort to prostitute the courts and subvert their assigned function: the rational adjudication of controversies in accordance with law.

Philadelphians will remember that in recent years responsible leaders to whom many people look for guidance have denounced courts, characterizing them as "bigoted" because of their considered judgment and decision that certain types of governmental financial aid to church-related schools violate the establishment clause of the first amendment. And very recently there was a widely publicized statement by a well known spokesman for persons understandably opposed to abortion in any circumstances, threatening to campaign for short term popular election of federal judges, rather than their lifetime appointment, because the Supreme Court had adjudged certain laws prohibiting abortion to be impermissible invasions of the privacy and personal liberty of women.

On another front we read of repeated threats from vocal local officials that judges will be opposed and defeated for reelection if they do not conform their own honest and lawful sentencing practices to the Draconian thinking of the executive or the prosecutor. I must interpolate at this point that when the preceding sentence was written I had in mind only local executives and prosecutors. But now, if one is going to cite this kind of pressure at all, he cannot with integrity ignore a nationally broadcast address which made page one newspaper headlines all over the country Sunday, a week ago. In a broadside against

judicial sentencing practices the President said: "The time has come for soft-headed judges and probation officers to show as much concern for the rights of innocent victims of crime as they do for the rights of convicted criminals."<sup>6</sup> Of course the key to the whole sentence, the denunciatory and inciting phrase that makes headlines and gives the broadside public impact, is "soft-headed judges." Actually, the attack is upon hard headed judges who are independent and tough minded enough to sentence in accordance with their own evaluation of all relevant considerations without yielding to the simplistic thinking and Draconian demands of particular prosecutors or local executives, or even chief executives.

At the other extreme, judges are denounced by partisans of the accused when sentences are severe. Pickets at Philadelphia's City Hall recently displayed signs vilifying and abusing a distinguished judge because he had imposed substantial sentences after a jury had found the accused persons guilty of contempt of court. Clamor of this sort is a matter of concern, not because it usually is harsh and strident, but because it reflects the misguided and all too prevalent notion that judicial decision should be partisan or responsive to the popular will and the mood of the moment.

Many years ago Mr. Justice Holmes expressed his personal reaction to then persistent denunciation of the courts, saying "that what . . . [litigants often] asked was favor, and if a decision was against them they called it wicked."<sup>7</sup> He then stated his own reaction to such demand for partisan decisions:

It is very painful when one spends all the energies of one's soul in trying to do good work, with no thought but that of solving a problem according to the rules by which one is bound, to know that many see sinister motives and would be glad of evidence that one was consciously bad.<sup>8</sup>

I am sure that Holmes, doughty warrior that he was, lost little sleep and changed no opinion because of pain inflicted by unbridled attacks and harsh denunciation. And it is to be hoped that judges generally are strong and tough enough to take invective in stride. Few of us were forced to become judges. So we accept the office, *cum onere*. Even so, it is painful indeed when, as occasionally happens, judges' families are subjected to insulting letters and abusive telephone calls, and even to social ostracism by those who have been their familiars.

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<sup>6</sup> Philadelphia Inquirer, Mar. 11, 1973, § A, at 1, col. 1.

<sup>7</sup> O.W. HOLMES, *supra* note 4, at 294.

<sup>8</sup> *Id.* 292.

### III. PUBLIC DEFIANCE OF JUDICIAL AUTHORITY

But much more serious is the danger of eroding the community's willingness to abide judicial orders and decrees, a willingness that our polity inherently presupposes and requires. In this connection, it must be recognized that from our beginnings the people of this country have not been notably respectful of duly constituted authority. At first, our revolutionary origin contributed to this. Moreover, in frontier society each individual tended to be a law unto himself. It will be remembered that Thomas Jefferson, commenting on Shay's Rebellion, expressed the hope that no generation would pass without such an expression of our original revolutionary spirit. However, it seems unlikely that the spirit of 1776 motivates much human conduct as we approach 1976. Unwillingness to abide judicial authority in our times is characteristic not of frontiersmen, not only of those who regard themselves as disinherited and outside of the law, but also of those who live in relative comfort and self-satisfaction as beneficiaries of that legal order which a complex, predominantly urban society requires. If our desire, our perceived immediate personal advantage, or even our convenience is frustrated, our disposition is to flout the law and disobey the courts. With myopic vision, we tend to exalt personal desire and likely immediate advantage over the value to all of us that inheres in acceptance of legal order and compliance with the mandate of our courts.

On the one hand, violence in the streets moves us to support the legal order, for in that situation we see ourselves as potential victims. Yet, deliberate mass slaughter of unresisting women and children by Americans in a distant theatre of war, all duly established in an American court, seems to disturb us less than does the consequent judicial imposition of severe penalties on the perpetrators of the atrocity. In that case, we don't see ourselves as potential victims. So, the vocal advocates of severe sentencing to preserve law and order in other situations cry out for leniency in this one.

Closer to home, early this year, a Philadelphia court, after appropriate hearing and deliberation, ordered a labor union and its constituted leaders to terminate a strike of local school teachers. No doubt the strikers and their leaders believed that they had just grievances and that negotiation had failed to yield a fair settlement. For present purposes we may assume that their view of the controversy had merit. Yet the question of the legality of the strike had been duly presented and fully argued in the judicial forum where a court, exercising its best independent judgment of what was right and lawful, had ordered

the union and its leaders to end their strike. Until and unless that order should be reversed, the court's mandate was authoritative. Those who refused to obey it simply placed their own demands above the legal order.

However, it is not the mere defiance of judicial authority by certain individuals that is important here. Far more damaging is apparently widespread public acquiescence in, or at least complacency about such defiance. One such episode leads to another, and yet another, unless recalcitrants are made aware of strong public sentiment that the courts must be obeyed, even when the community is sympathetic with the losing side of the underlying controversy. There is no other way to preserve the meaning and the essential protection to all that inhere in a regime of law administered by professionally trained men and women sitting as judges and sworn to dispense impartial justice to the best of their ability.

This is not to ignore those situations in which conscience will not permit an individual to comply with a demand of the law. Such cases are much debated and properly so, for they present very troublesome questions of law and morals. Certainly, the individual who disobeys a judicial mandate because of conscience and accepts whatever punitive consequence follows is entitled to respect. But situations in which the law requires the individual to act in violation of his conscience are relatively few. And those situations should not be confused with the others we now are discussing in which the individual undertakes to defy or flout judicial decisions and orders with which he disagrees. The distinction between demands of conscience and demands of self-interest is real and should not be too difficult for a sophisticated people living in a complex society to recognize and apply, in an effort to make their legal order work.

Chief Justice Hughes, speaking on the 150th anniversary of the Supreme Court, described the judicial role in our legal order and affirmed its essentiality in language that merits quotation and remembrance:

The recognition of this anniversary implies the persistence, through the vicissitudes of one hundred and fifty years, of the deep and abiding conviction that amid the clashes of political policies, the martial demands of crusaders, the appeals of sincere but conflicting voices, the outbursts of passion and of the prejudices growing out of particular interests, there must be somewhere the quiet, deliberate and effective determination of an arbiter of the fundamental questions which inevitably grow out of our constitutional system and must be determined in controversies as to individual rights. It is



the unique function of this Court, not to dictate policy, not to promote or oppose crusades, but to maintain the balance between States and Nation through the maintenance of the rights and duties of individuals.<sup>9</sup>

While Chief Justice Hughes focused upon litigation that presented great constitutional issues, what he said applies as well to the much larger body of ordinary adjudications made every day by thousands of judges in the unending effort to settle disputes, small as well as large, justly and according to law. Civilized peaceful coexistence in our settled modern communities depends upon the satisfactory functioning of this system. We need to believe in it, understand its postulates, and want it to work as ideally it should. We must want judges to be able and impartial. We must recognize that proper and constructive control of the judiciary is not achieved by pressure for partisan adjudication or by denunciation of unpopular decisions. We must understand that defiance of courts is the way to anarchy and chaos.

#### IV. THE QUALIFICATION AND SELECTION OF JUDGES

All that has been said so far presupposes that the judge himself will exhibit fitness for a role, the special and difficult character of which cannot be overemphasized. Mr. Justice Frankfurter, ever conscious of the extreme difficulty inherent in judicature, described the judge's task this way:

[A]mid tangled words, amid tangled insights . . . the judge must find the path through precedent, through policy, through history . . . to the best judgment that poor fallible creatures can arrive at in that most difficult of all tasks, the adjudication between man and man, between man and the state, through reason called law.

Then he added that the judge must do all this with "allegiance to nothing except the effort."<sup>10</sup> If the task thus pictured is to be performed well in case after case, judges must administer a systematic process of adjudication which makes sense and preserves objectivity through the rigorous application of reason, and is constantly informed and corrected by experience in adapting law to ever-changing times and circumstances.

Certainly, it will not do to assume that anyone who shall acquire a black robe and be authorized to preside over judicial proceedings is up to the job that Justice Frankfurter has described. It may not

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<sup>9</sup> 309 U.S. XII-XIII (1940).

<sup>10</sup> Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 905 (1953).

be too disloyal to one's own caste for a judge to believe that few observant lawyers and laymen see the judiciary today as a body of knowledgeable and independent men and women, almost all of whom are able and determined to render justice ably and impartially according to law. How many Americans see judges as politicians wearing robes? To how many are judges lackeys of some establishment? How many fear judges as arbitrary and tyrannical, or as cunning and devious? In all probability a nationwide poll would show the number to be disturbingly large. And such demeaning appraisals no doubt contribute largely to that present "crisis of confidence" in the judiciary to which our Chief Justice alluded.

Recognizing this, it is up to judges themselves and to those who play major roles in the selection of judges to eliminate any reasonable basis for our bad image. Our actions, off the bench as well as on, can enlarge public willingness to accept the authority of even our unpopular decisions.

First of all, it is important that judges stand somewhat apart from the battles that inevitably rage in society. If this makes for a different and less exciting life than many have known before assuming judicial office, it also makes for greater public acceptance of the judge as a fair and impartial arbitrator.

Many in this audience will remember the intimate and enduring friendship between President Truman and Chief Justice Vinson. There came a time when the President asked his friend, the Chief Justice, to go to Russia and there, on the President's behalf, engage in certain informal talks with Stalin. The President thought, correctly no doubt, that his known close personal relationship with Vinson, as well as the exalted office of the Chief Justice, would make the contemplated conversations more significant and effective than communications through formal diplomatic channels. But the Chief Justice refused to go. A year or so later he told me, as I am sure he told others who were privileged to know him far better than I, that this had been one of the most painful decisions of his long public career. Yet he still firmly believed that it was more valuable to our country that he keep the judiciary free, both in fact and in appearance, from involvement in the political arena than it was for him to render useful service in the important area of top level diplomacy. His arm simply could not be twisted, even by his friend, the President.

On a different level and more frequently, judges who have been actively and constructively engaged in politics before ascending the bench are likely to be invited, even strongly urged, to continue to

play a quite active informal role in political party councils. Indeed, within the memory of some of us, there have been a few judges so insensitive as to serve as delegate to a political convention, or even to conduct party business from judicial chambers. Until it shall be apparent that judges remove themselves completely from politics—except for the unfortunate necessity in many states of campaigning for judicial office on a party ticket—many people will continue to regard judges as politicians wearing robes who cannot be trusted to render impartial and disinterested decisions. The effective rule of law cannot indefinitely survive any well-grounded distrust of this sort.

Belief that judges are political partisans is but one hurtful source of lack of confidence in the judiciary. It is equally damaging to an effective legal order that the public have a basis for believing that, apart from party politics, judges favor particular interests or persons in litigated controversies. Here too, judges themselves can help correct this impression and promote essential public trust of the judiciary. In recent years, I am happy to say, the judges in the federal system, and I am sure in others as well, have exerted themselves in an effort to avoid even the appearance of bias, partisanship, or untrustworthiness.

A few items will serve to indicate the nature and scope of this effort. The Judicial Conference of the United States, the body of judges that establishes administrative policy for the federal courts, has explicitly ruled that federal judges shall not be officers, or directors, or employees of any type of profit-making enterprise. Beyond that, we are not permitted to solicit contributions to even the most worthy of charitable or other nonprofit enterprises, lest we seem obligated in the future to return the favor when the donor happens to be interested in litigation before us. By the same token, we are forbidden to receive substantial gifts from friends other than members of our families. In case a federal judge is doubtful about the propriety of any contemplated course of action, a standing national committee of highly respected, sensitive and experienced fellow judges is available on request to guide and counsel him. Every six months, each of us files a detailed statement of any and all extra-judicial compensation and any gifts he may have received, together with a listing of all organizations in which he occupies a leadership role. And these statements can be inspected as public documents. All of these items and more constitute a self-imposed code of conduct whereby federal judges undertake to assure that impartiality and disinterestedness, both actual and in public

contemplation, which is so essential to confidence in the judiciary. Happily, numbers of state courts are moving in the same direction, and others no doubt will follow.

But important and essential though such undertakings of judicial self-discipline are, their success depends in substantial part, indeed in first instance, upon the kind of person that is selected for judicial office. The present crisis of confidence in the courts has stimulated purposeful efforts of many people to improve the processes of judicial selection. Some observations relevant to such reforming efforts seem appropriate at this point.

It is unrealistic to anticipate for the calculable future the elimination of all political considerations either in the appointment of judges by the executive or in selection and endorsement of candidates for elective judicial office by political leadership. Indeed, it is arguable that in democratic society administered by representative public officials it is appropriate that persons be selected to become judges whose outlook on society and philosophy of life and law are congenial to the currently dominant political leadership. With reference to our national courts, it has been said that it was appropriate that judges selected during the 1930's should reflect the outlook of the New Deal and, by the same token, that recent appointees reflect the yet unlabeled philosophy of the present national administration. There is little point in debating this because it is going to happen in any event. Of course some diversity of outlook is likely to be preserved on multi-judge courts, if for no other reason because judicial tenure is likely to be longer than the uninterrupted dominance of any political party.

More fundamentally, the congeniality of a judge's view of society and law to those who select him need not and should not mean subservience to the will of political leadership. I have quoted Justice Frankfurter's formulation of the judge's responsibility as a continuing effort to achieve justice "with no allegiance except to that effort." So long as those who elect or select judges want and choose men and women of strong and independent mind, with no allegiance except to the effort to achieve justice, the political and philosophical congeniality of new judges to their selectors is a tolerable, perhaps conceptually desirable consideration.

This leads to the thought that, short of the elimination of political considerations in judicial selection, the diminution or reorientation of the role those considerations play is both desirable and feasible. All too often, the observable tendency of those who dominate or influence the selection of judges is to seek the politically most deserving candidate or focus upon the most expedient political choice, with at most secondary concern that the individual be otherwise well qualified for

judicial office. And at times even such secondary concern seems to be lacking. At any rate, if political preference or advantage seems great enough, the candidate is likely to be given the benefit of even the most dubious possibility that he may satisfy minimum qualifications.

Such a process discloses a hurtful inversion of priorities. Search properly should begin with an effort to identify several of the most highly qualified persons available for the office; integrity, ability, independence, temperament, and all other desirable qualities considered. Only after potential candidates are found to rate high by those measures is it appropriate to turn to political considerations as a basis for choice among otherwise highly qualified candidates. There is a great difference between treating judgeships as mere political rewards on the one hand and, on the other, selecting for their high merit judges whose philosophy makes them politically acceptable. No doubt it will be difficult to bring many of those who influence judicial selections to understand, much less respect this approach. But the sensitivity of political leaders to public opinion, and it is hoped to the judgment of the bar as well, is such that manifest public and professional disapproval of the subordination of merit to political considerations in the selection of judges is the most hopeful way of correcting the evil. Fresh in mind are the current efforts of both the Pennsylvania Bar Association and the Philadelphia Bar Association in this direction.

Recently, by chance, I opened a volume of United States Reports to the transcript of the Supreme Court session memorializing Mr. Justice Cardozo shortly after his untimely death. A resolution of the Supreme Court Bar presented at that time reads in part as follows:

President Hoover's nomination of Chief Judge Cardozo was in the nature of a national call. In selecting him, President Hoover reflected the informed sentiment of the country that, of all judges and lawyers, Chief Judge Cardozo was most worthy to succeed Mr. Justice Holmes.<sup>11</sup>

It rarely will be possible to say with confidence, as was so appropriately said of Cardozo, that one man, above all others, seems the most suitable to fill a particular judicial vacancy. But it is possible, and it should be insisted by all who are concerned, that we have excellent administration of justice at all levels, that every person approved for judicial office be one of the most highly qualified. A few years ago thoughtful people were shocked by a suggestion of a member of Congress that mediocrity, which the speaker described as characteristic of most people, was entitled to representation on our highest Court.

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<sup>11</sup> 305 U.S. XII (1938).

Happily, the ludicrousness of the suggestion made it self-defeating. Today lawyers and all other informed citizens should find it intolerable that courts at any level of judicial hierarchy dispense a mediocre brand of justice, whether in cases of great importance or in small controversies involving the humblest of people. There can be no great society without excellence in the administration of justice. And there can be no effective administration of justice unless the community, led by the bar, supports the courts in the performance of their essential assigned role.

I say "led by the bar" advisedly. For potentially the lawyers of this nation are the group most competent to enlarge community understanding of the judge's role, to inculcate greater respect for judicial authority and to stimulate public insistence that only eminently qualified persons be made judges. But this potential can be realized only to the extent that the bar itself is a highly respected group, as well as a professionally knowledgeable one. A generation ago Chief Justice Stone told a distinguished audience of lawyers that "in our own time the Bar has not maintained its traditional position of public influence and leadership."<sup>12</sup> I think it is fair to say that today the bar is less vulnerable to, but certainly not wholly undeserving of, such criticism. Fortunately, some of its most constructive undertakings are in the area of tonight's discussion.

For example, the Judiciary Committee of the American Bar Association, acting as advisor to Presidents and Attorneys General, has repeatedly prevented the selection of poorly qualified candidates for federal judgeships. I have mentioned similar current undertakings by Pennsylvania lawyers. But lack of courage to stand on principle and to resist internal logrolling have made all too many bar groups far less effective monitors or advisors in the process of judicial selection. And in the separate business of stimulating respect for and support of judicial authority, the potential influence of the bar on public attitudes is not often exerted.

This is not to single out lawyers in any invidious way. For the tasks ahead challenge judges, lawyers, political leaders, and all informed citizens. But the lawyer's professional knowledge and understanding necessarily enlarge his role and potential influence.

## V. CONCLUSION

Almost a century ago James Bryce, concluding his elaborate commentary upon the American Commonwealth, wrote: "[T]he

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<sup>12</sup> *The Public Influence of the Bar*, reprinted in 48 HARV. L. REV. 1, 3 (1934).

masses of people are wiser, fairer, and more temperate in any matter to which they can be induced to bend their minds, than most European philosophers have believed it possible for the masses of the people to be."<sup>13</sup> It will be observed that this complimentary observation is qualified by the assumption that people can "be induced to bend their minds" to any given matter. Bryce seems to have believed, as did Jefferson and all others who have shared his optimistic view of our capacity for self-government, that Americans would increasingly "bend their minds" to rational understanding of the conceptions and requirements of our governmental scheme and that they would act with sophistication thus achieved. But Justice Holmes, ever unsentimental in judgment, cautioned us not long after Bryce that "it will be a slow business for our people to reach rational views, assuming that we are allowed [to continue] to work peaceably to that end."<sup>14</sup>

To reach rational views of the administration of justice and rational understanding of what is needed to strengthen the legal order, and then to translate understanding into effective supportive conduct, is slow business indeed. But sixty years after Holmes spoke we still are allowed some time—how much I shall not speculate—to work peaceably toward that end. We cannot afford less than our best unremitting effort.

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<sup>13</sup> J. BRYCE, *THE AMERICAN COMMONWEALTH* (1888), reported in H.S. COMMAGER, *Democracy and Judicial Review*, in *FREEDOM AND ORDER* 3, 50-51 (1966).

<sup>14</sup> O.W. HOLMES, *supra* note 4, at 296.