

NATIONALISM AND THE JUDICIARY

This is the seventh of the series of editorials by Mr. Roosevelt on "Nationalism and Progress," and the second relating to the Judiciary. This subject will be further discussed next week.—THE EDITORS.

One of the most admirable features of our constitutional system is the high position which it gives to the judiciary. In no other country in the world have the judges possessed or exercised the enormous influence upon the constitutional and institutional growth of society that they have here exercised. This is particularly true of the National judiciary, and therefore of its head, the Supreme Court. It would be hard to overstate the debt due by the American people to the bench, National and State, and hardest of all to overestimate the debt due to the Supreme Court. The three men to whom throughout our National history we as a people owe most are two Presidents, Washington and Lincoln, and one Chief Justice, Marshall. Marshall is the one man whose services to the Nation entitle him to be grouped with the two great Presidents, and he owes this to the fortunate fact that not only did he as a man deserve to rank with them as men, but that his office as an office deserved to rank, and did rank, with the great offices which they held. The office of Chief Justice is, under some circumstances, as great an office as that of President, and at all times comes second only to it in importance. And the man who fills that office is, like the President, the representative of all the people, and is entitled to their respect and support. Moreover, I believe it to be true that, taken as a whole, the judges of the country are, and have been, more useful public servants than any other public men. A wise and upright judge can render, and does render, in the long run, rather better service than can be rendered even by the right type of executive or legislative officer; and I believe that we find a larger proportion of men who reach the proper official standard among judges than among the members of any other class of public servants.

Yet, while not merely granting that this

is the fact, but insisting upon it, it remains true that the judges are public servants just as other officials are, that they are, or should be, responsible to the public just as other officials are (for it is idle to call a man a servant of the public unless he is responsible to the public), and that therefore there should be criticism of them just as of other officials. In the case of judges it is even more essential than in the case of other public officials that the criticism should be wise and temperate, and, above all, that it should be absolutely truthful. I very seriously question whether, on the whole, we do not suffer in our public life quite as much from unjust assault upon upright public servants as from failure effectively to assault corruption and its exponents. Many newspapers and many magazines, sometimes because they are controlled by the special interests, and quite as often because they are seeking to capitalize sensationalism and to turn to commercial advantage the literature of exposure, have done, and are doing, all they can to degrade public life by practicing every species of reckless sensational and hysterical mendacity at the cost of reputable public servants.¹ It makes not the slightest difference whether this form of falsehood is practiced because the writer is hired, directly or indirectly, by some special interest, or whether he is merely recklessly bent upon gaining money or notoriety by sensational slander; it makes no difference whether he is a cultivated man actuated by sour envy, or a crude fanatic who, in the name of conscience, is willing to perpetrate outrages upon conscience; and, finally, it makes little difference as to what particular class of public servant he assails. The infamy lies in the deed itself. The man who violates the Ninth Commandment and bears false witness against his neighbor stands on as low an ethical plane as the man who violates the Eighth Commandment and steals from that neighbor. To destroy the confidence of the people in the uprightness of upright judges is only a degree worse than to destroy their confidence in the uprightness of any other upright officials. Emphasis, however, must be laid on the

¹ Professor Hugo Münsterberg's striking article in a recent number of the "American Magazine" should be studied by all men who wish to elevate our public life.

uprightness, on the decency, on the ability and willingness to serve the public, so far as the official is concerned, rather than upon the office which he holds. It is impossible adequately to honor the faithful public servant unless we discriminate in the sharpest possible fashion between him and the unfaithful public servant; and all sense of such discrimination, all sense of proportion, is equally lost, whether we confound the honest and the dishonest, the competent and the incompetent, in indiscriminate praise or in indiscriminate abuse.

With judges there should be even more care exercised than ought to be exercised as regards other public men. But there must be criticism. With the judge, as with other public men, it is undoubtedly ruinous to follow the unfortunately prevalent custom of paying heed simply to the debit and not also to the credit side of the account between the public servant and the public. There is altogether too much tendency to pay more attention to punishing than to rewarding public service, altogether too much tendency to omit entirely the sum of the man's good qualities and think only of his mistakes or shortcomings; a tendency which inevitably results in pushing forward weak nonentities simply because the nonentity rarely does anything either good or bad, while the strong man, however good, is sure, if he has had a long career of successful achievement, to have his record of good deeds interspersed with occasional failures and mistakes. Therefore, in all but wholly exceptional cases, the judge, like any other public servant, should be judged by his record as a whole, not by his record on some particular matter. Moreover, in the case of the judge, in those instances where he acts simply as an umpire trying to do justice between individuals, very great caution should be exercised in criticising his decision. In a great many cases of this kind there is certain to be room for wide divergence of opinion as to any decision rendered, and it is therefore necessary to accept from the outset the view that the judge's decision on such questions should not be criticised—unless in a long series of decisions his attitude is such as to create a real presumption of moral or intellectual unfitness for his task.

The case is wholly different when the judge decides what in its essence is not a mere question between individuals but a question affecting fundamental policy. The proper attitude as regards this latter class of cases has been admirably set forth by a Justice of the Supreme Court of the State of New York, the Hon. Cuthbert W. Pound (in commenting on my remarks on the Bakeshop Case):

Confidence in our courts does not require that their decisions on economic questions shall be regarded as binding rules of political conduct on such questions.

When Lincoln, in the debates with Douglas, argued that the decision of the Supreme Court of the United States in the Dred Scott case, which protected the rights of the slaveholder in the Territories, should be set aside by the people at the polls . . . [he was] not assailing decisions of judges on questions of private right, but discussing the action of statesmen on matters of Governmental power.

So long as our courts exercise this power to pass upon the constitutionality of statutes which reflect legislative policy on matters affecting the common good, so long will the principles of government underlying their decisions in such cases be subject to debate.

There spoke the true public servant, the public servant proudly conscious of his own integrity and his own desire and ability to serve the public, and resolute in his refusal to shelter himself, under any plea, from legitimate criticism for his actions when dealing with great public policies which must ultimately be decided by the people. After all, Judge Pound was only emphasizing anew the doctrine laid down by Lincoln in his first inaugural, when he said:

If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges.

Very worthy people, both lawyers and laymen, have at times advanced the view that there should be no criticism of judges, even when they decide on matters of public policy, because they say that judges have nothing to do with making the law, and merely have to apply it when made. Sometimes the position is taken in even more advanced form, to the effect, namely,

that only lawyers are competent to pass criticism upon judges. This latter position has always reminded me of an experience of mine nearly thirty years ago, when I was serving my first term in the New York Legislature. A measure was being voted upon which related to saloons in the city of New York. A new member from that city—himself a saloon-keeper—suddenly rose to a point of order, and with much indignation protested against the fact that there were "men not engaged in the liquor traffic who nevertheless were voting" upon the bill in question! The simplicity of this position appealed to everybody as exquisitely and unconsciously humorous, yet the assumption that only liquor-sellers have a right to express an opinion as to legislation concerning the liquor traffic is fundamentally identical in spirit with the assumption that lawyers have a greater interest than other citizens in the attitude of a judge on great questions of public policy.

There is no need of discussing the question whether or not judges have a right to make law. The simple fact is that by their interpretation they inevitably *do* make the law in a great number of cases. Therefore it is vital that they should make it aright. In an admirable article on "The National Government," in the "American Law Review," Judge Alfred Spring, an Appellate Justice of the Supreme Court of the State of New York, has set forth the proper position of the judiciary towards the Constitution, and incidentally has shown anew what ought to be, but apparently is not, familiar to every man who speaks of the functions of the Supreme Court—the absolute revolution in the Constitution caused by the action of the Supreme Court under Marshall. As Judge Spring points out, the Constitution is not made up of definitions, is not a dictionary, but is couched in general language, and is made for all time and to fit conditions and exigencies as they arise. He says:

The oracular statement of Carlyle that a written Constitution "does not march" has met refutation in the advancement of the United States. It has marched to the tune of progress, and with but few changes in its original form. Its onward march has been due to the far-seeing wisdom of its framers in not making it a lexicon of definitions, but

vesting power in simple, terse sentences, adaptable to circumstances as they come along.

He shows that all three branches of the National Government have inevitably at different times exercised powers which the founders of the Government did not contemplate their exercising. In speaking of the President, he says:

The language of the Constitution in fixing the status of the President is even more comprehensive than that lodging the judicial power in the Supreme Court. It provides that "the executive power shall be vested" in the President. A more complete investiture cannot be conceived, and yet, at the time of the adoption of the Constitution, and for long after, the tremendous energy imparted to the executive department by this all-embracing grant was not realized. Its mastery grew with the growth of the Nation, until to-day, within the limits of the Constitution, in practical effectual authority it is in alignment with the Congressional branch of the Government.

He points out, what ought to be obvious to every one, that the different Presidents have construed and have been able to exercise in widely differing manners the powers conferred upon them. The Presidency under Jackson and Lincoln was a totally different office from what it was under Buchanan, Pierce, and Johnson. Dealing with the Supreme Court, Judge Spring points out that for the first fourteen years of its existence it occupied a position of no importance in the National Government. Jay had resigned the Chief-Justiceship, and declined reappointment, because he felt that the judiciary was not clothed with any real authority. It was not the adoption of the Constitution nor its administration by some of its founders during the first dozen years of its life which put the Supreme Court in its present position under the Constitution. The Supreme Court itself, for the great benefit of the Nation, read its own place into the Constitution, after the lapse of years during which no one, none even of the founders of the Constitution, had dreamed of giving it such a place. It was the appointment of Marshall and the exercise by that great man of his extraordinary personal influence which gave the Supreme Court its great power in our Government, and which thereby also gave an enormous impetus to the growth among us of that spirit which made and kept us

a Nation, a great, free, united people, instead of permitting us to dissolve into a snarl of jangling and contemptible little independent commonwealths, with governments oscillating between the rule of a dictator, the rule of an oligarchy, and the rule of a mob. Those who on abstract grounds insist that the courts never have anything to do with the embodiment of public policy into law ought to pay heed to the simple fact that, under Marshall, the Supreme Court of the United States worked a tremendous revolution, not merely in ordinary law, but in the fundamental Constitutional law of the land. When Marshall was appointed, as Judge Spring has shown, it was usually assumed, when the subject was discussed at all, that Congress, like the English House of Commons, could pass upon the validity of its own acts. When the adherents of Jefferson and Madison opposed this proposition, as they did in the Kentucky and Virginia Resolutions, the position they took was that the Legislature of each State was a judge of Constitutional matters at issue between the States and the Nation, and that the States could declare void an Act of Congress. No one at the time thought of turning to the Supreme Court as the arbiter in such a matter, and this although the men who had made the Constitution were administering it. But Marshall, in his first Constitutional opinion, in an argument which, as Chancellor Kent said, approached to the precision and certainty of a mathematical demonstration, held that the Supreme Court possessed in itself the ultimate power to declare whether or not an Act of Congress was void. Nowadays the authority of the Court to decide that an Act of the Legislative Department, whether of the Nation or of any of the States, is repugnant to the Constitution seems self-evident. But no such power was expressly prescribed in the Constitution, and not only Jefferson but Jackson, with an emphasis amounting to violence, denounced Marshall's position and asserted that no such power existed. The reason why Marshall was so great a Chief Justice, the reason why he was a public servant whose services were of such incalculable value to our people, is to be found in the very fact that he thus read into the Constitution what was neces-

sary in order to make the Constitution march. As Judge Spring points out, Marshall acted in the spirit of Hamilton when the latter said: "A Government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and the complete execution of the trust for which it is responsible; free from every other control but a regard to the public good *and to the sense of the people.*" (The italics are my own.) Judge Spring says with wisdom: "This emphatic declaration of Hamilton is as true to-day as when the infant Nation, after much tribulation, started on its career." There never existed a public man who was less of a demagogue than Hamilton, and yet he thus explicitly recognizes the need of law being in harmony with public opinion.

Now, the briefest consideration of Marshall's public career, and of the attitude of Lincoln as quoted by Judge Cuthbert Pound, is sufficient to show several things. In the first place, it is absolutely necessary that there should be discrimination between, and therefore intelligent criticism of, the judges who by their power of interpretation are the final arbiters in deciding what shall be the law of the land. Men ought not to be classed together for praise or blame because they occupy one kind of public office. The bonds that knit them in popular esteem or popular disfavor should be based, not upon the offices they hold, but upon the way in which they fill these offices. Chief Justice Taney was, I doubt not, in private life as honorable a man as Chief Justice Marshall; but during his long term of service as Chief Justice his position on certain vital questions represented a resolute effort to undo the work of his mighty predecessor. If, on these positions, one of these two great justices was right, then the other was wrong; if one is entitled to praise, then the other must be blamed. Buchanan and Lincoln do not stand together in the popular eye because both were Presidents; on the contrary, they represent antipodal schools of thought. Andrew Johnson and Grant were as far asunder as Washington and Jefferson. There is no more ground for demanding that we refrain from differentiation between, and therefore from criticism of, Chief Justices than for adopt-

ing the same attitude as regards Presidents. We must bear in mind the office ; but we must also bear in mind the man who fills the office. This is a government of law, but it is also, as every government always has been and always must be, a government of men ; for the worth of a law depends as much upon the men who interpret and administer it as upon the men who have enacted it.

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