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Hubert H. Humphrey

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THE ROLE OF THE COURTS AND THE BAR IN IMPLEMENTING SOCIAL CHANGE

HUBERT H. HUMPHREY*

AS A STUDENT OF THE American political process, the roles of our courts and lawyers have always been of interest to me. I have had the good fortune to be able to view the American lawmaking process from several vantage points: as Vice President, a United States Senator, Mayor of Minneapolis, and professor of political science. The added dimension of having seen how our system of lawmaking works as both a lawmaker and a law enforcer has proved invaluable. Thus, although I am not a lawyer by profession, I have always taken a keen interest in the interplay between the branches of our Government and the citizens it represents. I hope to discuss in this short paper what I believe is one of the more important elements of this process, namely, the function of our courts and our lawyers in effecting social change through law.

The role of our courts does not raise a new question, of course. The Framers of our Constitution faced it when they laid the groundwork of our system of Government. These were men extremely wary of decision making by non-elected officials, and therefore very sensitive to the role the courts should play in the American lawmaking process. But although the question may be as old as our system itself, it appears to have assumed its more modern framework with the landmark Supreme Court decision in *Marbury v. Madison*,¹ where the doctrine of judicial review,

* United States Senator from Minnesota.

¹ 5 U.S. (1 Cranch) 137 (1803).

now so vital a part of our judicial heritage, was first announced.

Supreme Court review of the constitutionality of statutes is a prime example of what some have referred to as 'judicial lawmaking.' Such judicial lawmaking is not, however, limited to constitutional cases. The classic definition of the judge's role—that they speak the law but do not make it—is really a myth. As Oliver Wendell Holmes more accurately put it, "[J]udges do and must legislate."² This lawmaking occurs in all areas of the law—the development of the doctrine of products liability is judicial lawmaking of a type similar to the constitutional rejection of the "separate but equal"³ doctrine in *Brown v. Board of Education*.⁴

The real questions which must be faced, therefore, are the nature and proper limits of the lawmaking in which courts do engage.⁵ These are the questions over which jurists, legislators and others have argued over the years.⁶ Recently, these issues

again have become the subject of controversy, perhaps in large part because of the changes in the membership of our highest tribunal and the commitment of the present Administration to a "strict construction" of the Constitution.

Notable spokesmen for the Administration have, during the past year, questioned the role of the lawyer in our society (especially the 'new breed' of lawyers), as well as the proper role of litigation and judicial action as they affect social matters. It is, of course, true, as Chief Justice Warren E. Burger noted in his address at the dedication of the new Law Center at Georgetown University in Washington, D.C.,⁷ that the courts have often provided a "slow, painful and often clumsy instrument of progress"⁸ But in 1972, this is not as factually accurate a statement as it would have been twenty, or even ten years ago. Moreover, and more important, even if true, this statement should not be viewed as a valid basis for arguing that courts and lawyers should operate in a vacuum, unmindful of the social implications of what they do.

The bar of this country is one of its most important assets. Lawyers play a vital part in the smooth working of our democratic process; it is their advocacy and counseling which makes the law meaningful to our

² *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

³ *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled, *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁴ 347 U.S. 483 (1954).

⁵ See, e.g., Friedman, *Limits of Judicial Lawmaking and Prospective Overruling*, 29 *Mod. L. Rev.* 593 (1966). Friedman asserts that we should pay attention not to "the stale controversy over whether judges make law [but] to the much more complex and controversial question of the limits of judicial lawmaking." *Id.* at 595.

⁶ Compare, e.g., the late Justice Harlan's comments in the reapportionment case of *Westberry v. Sanders*, 376 U.S. 1, 48 (1964):

What is done today saps the political process. The promise of judicial intervention in matters of this sort cannot but encourage

popular inertia in efforts for political reform through the political process, with the inevitable result that the process itself is weakened.

with Judge Wright's remarks, quoted at text accompanying note 15 *infra*.

⁷ Remarks of Chief Justice Warren E. Burger at the Ceremonies Dedicating the new Law Center, Georgetown University, Sept. 17, 1971.

⁸ *Id.* at 12.

citizens. Recent years have seen the development of an even more socially conscious bar, concerned, both in their individual and professional capacities, about the serious problems this country faces. Whether they are called the "new lawyers," or "activist lawyers," (and "new" does not necessarily refer only to the young), they are fighting in our courts legal battles designed to protect the environment, the consumer, the poor, racial minorities—in short, to effect social change through law.

Before even discussing what the lawyers and the courts are doing today, it should be helpful to take a brief look at their activities for the past twenty or so years.

Brown v. Board of Education was clearly a major event as far as the role of our courts in our society is concerned. It may have been the first real dent in the historical truth that courts are "slow, clumsy and painful" instruments of progress. At the time *Brown* was decided, fifty-eight years had gone by since the Louisiana "separate but equal" railway accommodation statute had been upheld by the Supreme Court. Many of us then in Congress had long been urging meaningful civil rights legislation, but despite such efforts, Congress had not yet enacted any civil rights legislation overturning the separate but equal doctrine. At the state level, suffice it to say that it was the segregationist school legislation of Kansas, South Carolina, Virginia and Delaware which came before the Supreme Court in *Brown*. Yet, a unanimous Court rejected the established rule that separate but equal accommodations for black and white were constitutionally permissible, and took the first major governmental step in the still continuing fight for racial equality.

The Court clearly played the major role in the early years of the civil rights effort. *Brown*, at first, was not even fully supported by the lower federal courts,⁹ and numerous decisions on extensions of the *Brown* rationale to situations other than railway accommodations proved to be necessary,¹⁰ despite the fact that the implications of the *Brown* decision were clear.

Congress did not enact a major civil rights bill until 1964,¹¹ ten years after *Brown* was decided. Yet it seems inconceivable that any man of good conscience still thinks that what existed before 1954 should have been left untouched. Public support for and legislative inactivity concerning racial discrimination did not, and still does not, make such discrimination proper.

The marked social change spearheaded by the judiciary in the civil rights areas is evident. However, there are equally good

⁹ In 1955, the Supreme Court ruled that there be a "prompt and reasonable start toward full compliance" with their decision on school desegregation. *Brown v. Board of Educ.*, 349 U.S. 294, 295 (1955). During the mid- and late 1950's, many states tried delaying tactics or complied with the 1954 decision only in a token manner. Note, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 COLUM. L. REV. 193, 206 (1964).

¹⁰ See, e.g., *Johnson v. Virginia*, 373 U.S. 61 (1963) (courtroom seating); *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959) (segregated athletic events); *Gayle v. Browder*, 352 U.S. 903 (1956) (bus segregation); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (municipal golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches and bath houses).

¹¹ The Civil Rights Act of 1964, 28 U.S.C. § 1447 (1970).

examples of how the judiciary has taken action when no action was forthcoming from the other branches of Government. For example, until 1967, only one welfare action had been adjudicated in the federal courts,¹² despite the fact that the welfare laws were not responding well to welfare realities. Today, as one author notes, "the most obvious new element in the development of welfare 'rules' is the role of the courts."¹³ The examples do not stop here. *Baker v. Carr*¹⁴ sparked a revolution in the area of reapportionment, and the modifications made to the law of criminal procedure in the past twenty years are too well known to require citation.

What these examples show is that law does not operate in a vacuum, but is inextricably intertwined with pressing social issues. In each area mentioned above, reform was surely necessary, and had been necessary for a long time before the judiciary acted. When the courts acted, it was not for the purpose of usurping power, but with the recognition that legislative action was more desirable, and urgently needed. Perhaps this spirit was best described by United States Court of Appeals Judge J. Skelly Wright in a case involving racial discrimination in the operation of the District of Columbia public school system:

¹² Barret, *The New Role of the Courts in Developing Public Welfare Law*, 1970 DUKE L.J. 1.

¹³ *Id.* at 6. The primary role of the courts in this area might be the judicial dissolution of the right—privilege distinction. *Id.* See also Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

¹⁴ 369 U.S. 186 (1962).

It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance. So it was in *Brown v. Board of Education*, *Bolling v. Sharpe*, and *Baker v. Carr*. So it is in the South where federal courts are making brave attempts to implement the mandate of *Brown*. So it is here.¹⁵

The "other branches of government" did respond to pleas of the type quoted above and to the realities of the United States in the last third of the twentieth century. The Great Society program resulted in the enactment of more meaningful and comprehensive social legislation than at any previous time in our nation's history. The "most far reaching civil rights measure of the century"¹⁶ was enacted in 1964, and subsequent years saw further legislative progress in this area. The Economic Opportunity Act of 1964¹⁷ established Head Start, The Job Corps, and VISTA, to name just a few of the important attacks on poverty during this period. The model cities program and related measures began to concentrate on the problems of our cities, and housing problems were faced

¹⁵ *Hobson v. Hansen*, 269 F. Supp. 401, 517 (D.D.C. 1967) (Wright, J., sitting by designation pursuant to 28 U.S.C. § 291 (c)).

¹⁶ CONGRESSIONAL QUARTERLY, Special Report 730 (Apr. 5, 1968).

¹⁷ 42 U.S.C. § 2701 *et seq.* (1970).

with the establishment of HUD in 1965. Later years saw increasing emphasis upon the problems of the consumer, with the enactment of various measures to safeguard him from unsafe products and less than honest advertising and lending practices. The end of the 1960's and the beginning of the 1970's have witnessed a concerted legislative attack on environmental problems of all types.

The response of our political branches of government clearly have lessened the burden assumed by our courts in earlier years. During the 1950's and early 1960's, the courts were the primary progressive force in many areas of social concern. They were faced with problems where little or no legislative guidance was available, and where, more often than not, judicial "rules" were either nonexistent or seriously in need of revision. Novel cases were presented to the courts by a concerned bar, and the courts responded to the challenge.

But the shift to positive legislation has resulted in a significant change. Today, federal administrative agencies are directly or indirectly involved in most areas of social concern. At the least, the enabling legislation of these agencies requires protection of the "public interest." And, of course, there are now many specific pieces of protective legislation aimed at resolving pressing social problems.

The thrust of socially oriented litigation has, in turn, shifted. It is now aimed at broadening the concept of the public interest or making specific legislation applicable to a greater variety of situations. This has involved a greater effort on the part of the lawyer and the concerned citizens he represents. It has been the

creative litigation brought by these lawyers and citizens which appears to be the primary force in the social changes now being made through law.

It is understandable that the first steps in this transformation were cases brought to establish the right of the citizen to represent the public interest. To the layman, this might seem a rather strange thing to have to do, but the strictures of the judicial doctrine of "standing," coupled with the fact that the federal agencies were charged with the duty to represent the public interest, had for years severely limited the ability of members of the public to challenge agency action absent a *financial* interest in the outcome of such action.¹⁸

Then, in 1965, a group of conservationists sought to intervene in a Federal Power Commission proceeding to challenge the effects of a proposed hydroelectric facility would have on recreational facilities around New York's Storm King Mountain.¹⁹ The challenge was based on aesthetic considerations, not financial ones. The Power Commission challenged the standing of the petitioners to obtain judicial review. The United States Court of Appeals for the Second Circuit ruled against the FPC, and took a major step by rejecting the theory that a personal economic interest was a prerequisite to standing.²⁰

¹⁸ See, e.g., *Frothingham v. Mellon*, 262 U.S. 447 (1923).

¹⁹ *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir.), cert. denied, 384 U.S. 941 (1965).

²⁰ *Id.* at 616. The Court stated:

In order to insure that the Federal Power Commission will adequately protect the public

A year later, the federal appeals court for the District of Columbia upheld the standing of members of the listening public to challenge a broadcast license renewal application before the Federal Communications Commission.²¹ Then, in 1968, the Supreme Court in *Flast v. Cohen*²² significantly modified a position it had taken more than 40 years earlier in upholding the right of a taxpayer to challenge the constitutionality of a federal program giving aid to parochial schools.²³ The standing test today has evolved to one of (1) actual injury by a petitioner, whose interest is (2) "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."²⁴

interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under the Federal Power Act. . . . We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.

²¹ *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

²² 392 U.S. 83 (1968).

²³ In *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Supreme Court had denied the standing of a taxpayer to challenge a similar federal appropriation. See also Note, *Standing to Challenge Administrative Action: The Concept of Personal State*, 39 GEO. WASH. L. REV. 570 (1971); Davis, *The Liberalized Law of Standing*, 32 U. CHI. L. REV. 450 (1970); Henkin, *The Supreme Court 1967 Term—Forward: On Drawing Lines*, 82 HARV. L. REV. 63, 75 (1968).

²⁴ *Association of Data Processing Serv. Organizations Inc. v. Camp*, 397 U.S. 150, 153 (1970). *Barlow v. Collins*, 397 U.S. 159 (1970), decided the same day, upheld the standing of tenant farmers to challenge the validity of a regulation by the Secretary of Agriculture. The regulation challenged was 31 Fed. Reg. 2815, 7 C.F.R.

This broadening of the concept of standing has resulted in increased access to the courts for citizen groups to challenge proposed agency actions arguably not in accord with the agency's statutory commitment to the public interest. Welfare recipients have challenged the Social Security Act's Aid to Families with Dependent Children Program,²⁵ and conservationists have gone to court to challenge federally supported road construction.²⁶ A citizen group prompted the full judicial exposition on the scope of the National Environmental Policy Act of 1969²⁷ in the *Calvert Cliffs*²⁸ case, and conservationists had standing to challenge the recent thermonuclear test on Amchitka Island in the Aleutians.²⁹

The citizen actions mentioned above are only a few illustrations of the creative litigation brought by citizens and their "new" lawyers to protect the public interest by spurring administrative action, or when that fails, by enlisting the aid of the courts. A last example should suffice. For the past several years, the problem of recycling of solid waste has been debated in both Houses of Congress. Yet, meaningful specific legislation has been slow in coming. Nevertheless, the National Environ-

7093 (1966), amending 20 Fed. Reg. 6512, first issued in 1955. Issuance of such regulation was authorized under the Food and Agriculture Act of 1965, 7 U.S.C. § 1444(d) (1970).

²⁵ *National Welfare Rights Organizations v. Finch*, 429 F.2d 725 (D.C. Cir. 1970).

²⁶ *Citizens Comm. for Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970).

²⁷ 42 U.S.C. § 4321 *et seq.* (1970).

²⁸ *Calvert Cliffs Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

²⁹ *Committee for Nuclear Responsibility, Inc. v. Seaborg*, Civ. Act. No. 1346-71 (D.C. Cir. Oct. 5, 1971).

mental Policy Act of 1969 is already the law, and section 102 requires every federal agency to

(C) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action.³⁰

In 1970, 1971, and 1972, the nation's railroads applied for increased rail freight rates for certain materials, including recyclable iron, steel, textile, paper and glass scrap. A group of George Washington University law students, calling themselves Students Challenging Regulatory Agency Procedures ("SCRAP"), intervened in these actions, alleging in part that the failure to consider the environmental effects of such a rate increase constituted a violation of NEPA. If the students are successful, it will mean that protective environmental legislation will have been applied to economic acts, something that has not occurred before.

Actions of the type briefly described above have helped make the people of our country more aware of the serious problems that face us, and in many instances

have done something about those problems. And this has, for the most part, been brought about not by asking the courts to make new laws, but to enforce those laws designed to protect the public which have already been enacted by the Congress and state legislatures. It is here that the contribution of our new lawyers has been the greatest, and where the opportunity for continuing measures in the public interest is available to those lawyers willing to meet the challenge.

Our system of government is designed for the benefit of those it governs. Almost two hundred years have shown us that this is not always as simple a matter as it sounds. Effective good government demands a continuing effort by all branches of government and active participation by the people for whose benefit the structure has been created. Law, of course, is part of that structure, and to be meaningful, must respond to the realities and problems which continually confront us. Recent years have witnessed a judiciary, a bar, and a citizenry attempting to make the law respond. In so doing, they have used our system in a positive way; they have tried, and often succeeded, to implement social change through law, without violence or upheaval. The fact that the courts now are less painful and clumsy, and that our bar is more aware of matters of importance to society should not be cause for concern. Indeed, it should encourage us all.

³⁰ 42 U.S.C. § 4332(c) (1970).