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THE SUPREME COURT AND "THE MOMENT OF TRUTH"*

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This annual ceremony of our non-partisan Association is being held at a time when most political scientists are preoccupied with the events of a fateful national election. To avoid any implications of partisanship, it seems best on this occasion to eschew politics in the conventional sense and to concentrate on institutional analysis not applicable to the current conflict. This discussion will therefore deal with the Supreme Court and with the Court primarily as an institution, rather than with problems of changing personnel or the political implications of particular decisions. It will assume that institutions are important in terms of their intrinsic nature and that the kind of institution to be used for a particular governmental task depends largely on the kind of task to be performed, with room for exceptions in exceptional circumstances. So it is that the Court will be presented not in isolation but as a part of the judicial system at whose apex it stands, and will be discussed in terms of the assumptions which lie back of and dictate its rituals, routines and procedures, and which have a great deal to do with determining its efficacy for the tasks allocated to it.

Because analysis of hallowed institutions and ritualized performance is often incorrectly identified with the expression of hostility or disrespect, with only deference permitted on the part of him who would leave the ritual or the institution with the stature it had when he approached it, let me emphasize that the purpose here is not to attack or to disparage but to analyze and to encourage further analysis, with creative ends in view. Political scientists as critics of all aspects of government have an obligation to do more than merely defer where

our courts are concerned, even at the risk of the dispelling of halo, but it behooves them to make clear their ends and aims in order to avoid misunderstanding. The intent in this discussion is to highlight the intellectual procedures involved in the hybrid performance of deciding cases and at the same time shaping the development of law, with an invitation to discriminating thought about the judicial process as distinguished from legislative and executive processes in American government.

A further intent is to express enthusiasm for the efforts of those of our profession who are likewise delving into institutional subject matter. Political scientists, in order to deal effectively with the materials of the judicial process, must look at the process for what it traditionally has been and for what it is at its core, and not merely for what it is at its periphery, as we have too often done. To state the point negatively, we must not assume that the judicial process is "merely politics," unless we are willing to define "politics" with such breadth as to deprive it of much of its precise meaning or of its meaning as held in popular understanding. Particularly we must not define the judicial process as merely politics and then, as did the author of a much-discussed work a few years ago at one of our annual meetings when goaded for definition by some of our colleagues, define politics as "shenanigans." The work of the Supreme Court clearly involves politics, and at times politics in the form of "shenanigans," but it involves a great deal more, and the "more" as well as the politics is subject matter for political science.

I

Along with such other characteristics as it may incidentally possess, a court in our judicial tradition is an institution which determines the facts involved in particular controversies

* Presidential address, delivered before the American Political Science Association in New York City, September 8, 1960.

brought before it, relates the facts to the relevant law, settles the controversies in terms of the law, and more or less incidentally makes new law through the process of decision. Over the centuries of Anglo-American history our judiciary has been developed and geared to this process so that it has an integrity or integratedness peculiarly its own. In particular it has a mode of informing the minds of the responsible officers—in this instance the judges—which is unique and which must be kept in sharp focus in any attempt to estimate the capacity of a judiciary to perform competitively in the gray areas which lie between it and institutions which are primarily legislative or executive. Our profession has analyzed backwards and forwards and at various other angles the rituals and procedures and particular proceedings whereby legislative bodies and executives and administrative organizations arrive at decisions and carry those decisions into effect. Over against such studies we need to portray the methodology calculated to exclude from the decision-making process things irrelevant and therefore corrupting, as antiseptic practices in our hospitals ward off invasions of germs, and to bring judicial minds to the peak of concentration needed for the right decision of the case at hand.

Tracing all the way back through the Anglo-American legal tradition and into our Roman law heritage as well,¹ we note that the basic structure for informing the judicial mind and bringing it to the peak of decision—and this includes the mind of the jury where the jury is a component part of the court—has been what lawyers call the adversary proceeding.² The court determines rights, or guilt or innocence as the case may be, only after the case has been shaped into a clash of opposites, and usually only after counsel, by means of briefs or oral arguments or both, have engaged in trial by combat for the illumination of the mind of the court.

Part of our difficulty in getting at the merits and demerits and the peculiar significance of the trial by combat in the court room lies in the reticence or the inarticulateness of judges and other lawyers with respect to it. It has been said that in conferences on professional ethics between lawyers on the one side and philosophers and theologians on the other the "adversary system" was the place where commu-

nication broke down. Law students have been found to be disturbed by it and unable to articulate its proper limits. It is admitted that "the legal profession is itself generally not very philosophic about this issue."³ This lack of articulateness on the part of the legal profession about the ends and aims and achievements of the adversary proceeding is a matter for regret, and it constitutes a serious handicap for those who would appraise it not merely as a device for deciding cases but also for defining and developing the pattern of the law.

While an institution thousands of years old is not necessarily to be judged in its current operations by what it was long ago, some further reference to history may be helpful for contemporary appraisal. Deeply entrenched in the minds of our forefathers was the conviction that the gods, or the one God as the case might be, intervened in the trial to bring victory to the right. We know that the Normans confidently relied on professional champions who fought for rival claimants, with the verdict going to the claimant whose champion defeated his opponent. Theodore Plucknett notes in his history of the common law that when in this period one person brought a criminal charge against another, the accuser and the accused fought in person, with grim result. "It was deadly; if the defeated defendant was not already slain in battle he was immediately hanged on the gallows which stood ready."⁴

Over the centuries we have moved a long way from the type of trial wherein the hand of deity was supposed to determine the balance in competitions of brute strength and cunning. Courts, by themselves and with the aid of legislatures, have developed and refined procedures to shape the course of combat between opposing counsel in a civilized society. During the early years of American history the system of common law pleading held with many judges a respect not unlike that accorded to the Supreme Being. "General rules will sometimes appear harsh and rigorous," said Chief Justice Kent in 1806, "but I entertain a decided opinion that the established principles of pleading, which compose what is called the science, are rational, concise, luminous, and admirably adapted to the investigation of truth, and

³ Lon L. Fuller and John D. Randall, "Professional Responsibility: Report of the Joint Conference," *American Bar Association Journal*, Vol. 44 (Dec., 1958), p. 1159.

⁴ Theodore F. T. Plucknett, *A Concise History of the Common Law* (5th ed., 1956), p. 117; Curtis, *op. cit.*, pp. 2-3.

¹ See Max Radin, "The Permanent Problems of the Law," *Cornell Law Quarterly*, Vol. 15 (Dec., 1929), p. 6.

² See Charles P. Curtis, *It's Your Law* (1954), pp. 1-41.

ought, consequently, to be very cautiously touched by the hand of innovation."⁵ The rules of procedure became so intricate and required so much technical knowledge on the parts of judges and counsel as to lead to the suspicion that they often did little more than contribute to the playing of intricate games in the court room and had little more to do with justice than earlier displays of physical prowess. A movement for the codification and simplification of procedure swept away a great mass of technicalities. Yet half a century after Chief Justice Kent's paean of praise had been voiced, Justice John A. Campbell approvingly echoed his words.⁶

II

Although the technicalities of common law pleading gradually yielded to legislative and judicial simplification, the basic pattern of trial by combat between counsel for opposing interests, with judicial supervision, remains to this day so firmly entrenched that it is hard for Americans to think of trials according to any other pattern. In a case decided in 1947 Justice Jackson declared that "a common law trial is and always should be an adversary proceeding." He contended that "discovery," a device in the new rules of civil procedure to bring about early disclosure of facts⁷ to promote the early sharpening of issues, "was hardly intended to enable a learned profession to perform its functions either without wits or with wits borrowed from the adversary."⁸ So it is that the battle between counsel, though not of physique but of wits, remains nevertheless a battle. Although when the trial is ended opposing counsel may companionably head together for the closest bar or restaurant and demonstrate the warmest friendship, during the course of the trial itself they oppose each other with all the skill at their command.

Since this clash of opposing forces is an essential ingredient of court room performance, it behooves us to inquire more fundamentally into the part played by counsel. A distinguished federal district judge has said that "The elementary and cardinal rule for all trial counsel in all cases is thorough preparation for both sides as to the facts and the controlling law."⁹

⁵ *Malcolm v. Bayard*, 1 Johnson (N. Y.) 453, 471 (1806).

⁶ *Dupont v. Vance*, 19 Howard (U. S.) 162, 175 (1857).

⁷ See Rule 34, Rules of Civil Procedure, 82 L. ed. 1588.

⁸ *Hickman v. Taylor*, 329 U. S. 495, 516 (1947).

⁹ W. Calvin Chesnut, *Sixty Years in the Courts* (1947), p. 65.

Justice Frankfurter has remarked that lawyers should be "experts in relevance."¹⁰ An author on appellate advocacy contends that the basic responsibility of the advocate is "to present the law and the facts of his particular case so that the court will know what the controversy is about, and will want to decide in his favor."¹¹ He illustrates the latter clause by a comment of Chief Judge Benjamin N. Cardozo, of the New York Court of Appeals, who, having listened to an argument by Charles Evans Hughes, was heard to say, "How can I possibly decide against this man?"¹²

In other words, the obligation to present the facts and the law of the case is hyphenated with the obligation to win the case, even though as a matter of fact this obligation can be fulfilled in each case with respect to only one of the parties. Counsel is in a technical sense an officer of the court as well as a professional employee, and he may sense the possibility that the decision of his case may vitally affect the law of the future; but his first allegiance is nevertheless to his client, whether a person, a corporation or a government, and he must win a victory for his client if the victory can be won through the rituals of court room performance.

How do we justify in modern times the support by government of a highly ritualized trial by battle of wits as a device for determining law and facts and the rights depending on them? For the most part we justify it by using it and not talking about it. It is doubtful whether we confidently assume that God intervenes to clarify the thinking and give fluency to the tongue of the counsel who represents the side on which God wants the victory, although it may well be that a sense of rightness as well as a desire to win may serve the cause of a client. The trouble with this assumption is that it may aid at the same time both counsel and both clients, for presumably rare is the advocate who in the course of his advocacy does not persuade himself that right is on his side.

But we presumably rely more heavily on a different factor, the stimulus of self-interest on the part of each litigant. At stake is likely to be the life, or liberty, or property, or authority of the client. For the purposes of each case, counsel absorbs into himself the sense of need

¹⁰ Felix Frankfurter, "Personal Ambitions of Judges: Should a Judge 'Think Beyond the Judicial'?" *American Bar Association Journal*, Vol. 34 (Aug., 1948), p. 747.

¹¹ Frederick Bernays Wiener, *Effective Appellate Advocacy* (1950), p. 228. (Italics supplied)

¹² *Id.*, p. 236.

for victory. This for him is not just any case, this is not just any situation in which men are involved in molding the law of the future. It is a case which he for personal reasons has to win if victory be possible, whatever the fate of the opposing advocate who from his opposing position feels exactly the same way about it. We seem to assume that demonstration of the depth of caring, which derives from the depth of personal interest, will best inform the court as to the law and the facts, and produce the best decision.

And what of the position of the judge? He is of course, among other things, a referee between the warring counsel. Charles P. Curtis recorded the anecdote of two prize-fighters who stood in the back of a court room where Chief Justice Lemuel Shaw was presiding. "Christ, what a referee!", one of them is said to have remarked in awe and admiration.¹³ As a referee the judge's conduct is supposed to be of the essence of neutrality. A distinguished Italian commentator has said that

When he is deciding a case the conscience of the judge should be like a blank page on which the episodes of his private life have left no mark; his extra-judicial knowledge and experience may be present only if they lose their episodic significance and assume a broader and more serene social significance, thus turning themselves into "maxims of experience" and becoming part of his general culture.¹⁴

It would therefore seem that the judge is asked to perform at one and the same time in dual capacities. He is to be active and alert as a referee in keeping counsel performing within the rules of the game, and utterly passive with the potentialities of a *tabula rasa* for the recording of reasoned arguments. He is the referee and the recorder, and then, finally, the engineer of the decision. It is through the clash of opposites in the form of reasoned arguments of counsel, of arguments perhaps impassioned but with passion held under discipline, that his mind is brought to the climax of decision, of completion, of dynamic insight—to the "moment of truth." The combat waged before him brings his mind to the synthesis of diverse elements, to the arrangement of relevant materials, to the point of reaction to the situation as a whole, to the *gestalt*¹⁵ which marks the

totality to be derived from the process of the trial. The decision copes with the controversy between the parties, and goes beyond the settlement of the controversy to some degree of restatement of the law. Yet it is to be remembered that this restatement is likely to be structured not in the form of a legislative enactment but in terms of the controversy involved, and conditioned by the formal issues of the proceeding as framed by the pleadings and otherwise. The decision gives us law, but it is law of a peculiar earthiness which follows the configurations of the case before the court.

III

About the climactic process of making judicial decisions as above outlined there is something intriguing for those of us not technically of the legal profession but nevertheless concerned with the making of intellectual syntheses in this and other fields. We know that there are many modes of achieving such syntheses, some of them stemming from careful design and others from the invoking of accident or of laws beyond our ken, from surrender to the unknown workings of the unconscious. Some syntheses are the product of grueling and perhaps uninspired labor, others of alternating periods of work and relaxation. Some arrive to the accompaniment of the scrape of a razor, and others amid or after restful sleep. We know that results are in part the product of self-conditioning. For example, if we learn to work effectively in a particular room and amid particular conditions, we may find it unrewarding to try to work elsewhere.

So it is that, even without the proof supplied by centuries of judicial experience, we can comprehend the fact that the judicial mind can be trained to do its best work amid the competitive and yet disciplined proceedings of the court room. It seems entirely plausible that judges might learn most effectively to grasp the facts and law of particular controversies and arrive at "right" decisions amid the heated clash of argument between opposing counsel, and that the imprint on the mind made at the time of the argument should carry over to the task of writing opinions at some later date. Although the sublimation of war to the death down to the level of precisely controlled verbal clash between dapperly dressed counsel may seem to import methodology into the present from the depths of antiquity, we are familiar with parallels in other fields. The court room trappings suggesting superior dignity and aloofness and righteousness on the part of enrobed judges may invite atheistic disapproval, but

¹³ Curtis, *op. cit.*, p. 2.

¹⁴ Piero Calamandrei, *Procedure and Democracy* (1956), p. 37.

¹⁵ See M. P. Follett, *Creative Experience* (1924), pp. 91-116; Wolfgang Köhler, *Gestalt Psychology* (1947).

here again we have ample parallels in other fields, so that complete alienness can hardly be claimed. Furthermore, for all the periodic denunciation of judge-made law and government by judiciary, we are aware of the fact that no two cases are ever exactly alike and that judicial decisions based on precedents must inevitably make such law as is required to fill the gap between the old and the new, between the previously decided case and the case now at hand. Here again judicial experience has ample parallels in the unfolding of experience in other fields.

Indeed, once we have come to accept judicial institutions for what they are in their own terms, those of us who are concerned about the relations of these institutions to other institutions of American government are apt to raise most of our questions about the judicial process in terms of its changing areas, where there are growing resemblances between it and other processes of government, with tendencies toward modification of the adversary proceeding as known to our legal tradition. We find that changes are taking place in the process of proving the facts upon which decisions are to be based. We find in the Supreme Court a measure of confusion of adversaries through admission of counsel or on briefs of additional parties as "friends of the Court." And we note particularly as to the Supreme Court that the very process of creating multiple-judge appellate courts with jurisdiction primarily over questions of law tends to dilute or move away from the adversary proceeding as practiced in courts of original jurisdiction.

For the finding of facts, our traditional method has been to do so by examining and cross-examining witnesses who are sworn to tell the whole truth and nothing but the truth—and who often leave the witness stand with a sense of guilt because the interests and strategy of opposing counsel have made it impossible for them to tell the whole truth or the truth without distortion. This process, along with the use of sworn written testimony in some kinds of cases, still provides our basic method. But changes are taking place in that in some jurisdictions we are now invoking scientific tests of breath and blood, and lie-detector tests, with confusion in the law as to the extent of admissibility of new forms of evidence. We are vaguely aware that some form of narco-analysis may in the near future become a much more accurate mode of getting truth from witnesses, whatever may be the constitutionality of its use, and our courts are yielding gradually to the presentation of a measure of expert opinion which from the layman would be re-

jected as mere hearsay.¹⁶ Outside the area of the trial itself, in the fields of sentencing and clemency, most facts are determined by means other than the formal adversary proceeding, with full judicial approval. A great deal that goes on in these areas requires careful observation.

As for the problem of parties in cases reaching the Supreme Court, many of these cases involve public considerations so vast as to dwarf the interests of the formal litigants. If in such cases the decision is to be the product of the clash of arguments between opposing parties, the minds of the judges may be most inadequately informed about the public issues as distinguished from the private issues involved. It cannot always be assumed—as Charles A. Beard once wryly phrased an assumption of free enterprise—that the maximum of selfishness produces a maximum of public good. Instead the public good may go by default while the immediate interests of one of the two contending litigants are served.¹⁷

The public interest, it is true, and other interests not directly involved in the litigation can sometimes be protected through intervention by so-called "friends of the Court." The practice is one of long standing. The Solicitor General may be asked to intervene in Supreme Court cases on the part of the government, or he may intervene on his own initiative, although the reins are held tightly and he may be denied the privilege of participating in oral argument.¹⁸ The American Civil Liberties Union files briefs in many cases in its field. So do labor unions. The National Association for the Advancement of Colored People virtually supplants the nominal litigants in the handling of key cases involving race issues.¹⁹ The American Newspaper Publishers Association rushes to the defense of the freedom of the press.²⁰

The vital question is as to how far the Court and the government should go in permitting

¹⁶ See Bernard Botein, "The Future of the Judicial Process: Challenge and Response," *The Record of the Association of the Bar of the City of New York*, Vol. 15 (April, 1960), 152-173; Manfred S. Guttmacher, *The Mind of the Murderer* (1960), pp. 109-226.

¹⁷ See Benjamin R. Twiss, *Lawyers and the Constitution* (1942).

¹⁸ See *United New York & New Jersey Sandy Hook Pilots Association v. Halecki*, 358 U. S. 803 (1958).

¹⁹ See "Private Attorneys-General: Group Action in the Fight for Civil Liberties," *Yale Law Journal*, Vol. 58 (March, 1949), pp. 574-598.

²⁰ See *Craig v. Harney*, 331 U. S. 367 (1947).

the intervention of additional parties. In 1949 the huge number of propagandist interventions in cases involving communist activities led the Supreme Court to restrict the scope of intervention—or rather, led the Court to remind the Solicitor General that briefs as friends of the Court could be filed only with consent. For a time thereafter that official virtually closed the door on intervention in government cases,²¹ whereafter members of the Court persuaded him to reopen it slightly, and the Court reserved to itself also a measure of discretion.²² The important item here is evidence of disagreement on the Court as revealed in a protest by Justice Black against restriction on briefs by persons not actual litigants. "Most of the cases before this Court," he wrote, "involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs."²³

For this discussion the significant point here is that to the extent to which the briefs of non-litigants are received, and particularly that participation in oral arguments is permitted, cases drift away from adversary proceedings in the traditional sense and become three-cornered or acquire more corners than three, and to take on some of the characteristics of committees and legislative bodies rather than of courts. Indeed, when judges participate as widely in the discussion of the cases as they sometimes do, and when multiple briefs are received or arguments permitted, the judges and counsel tend to merge in committee, though of course with decision in the hands of only the judicial portion of the committee. If committee discussions are to be the source not merely of particular decisions but also of the law of the future, it becomes a matter of concern whether the effective agency should be a committee in court or a committee of the legislature, or a legislature itself.

The matter is even more complicated than this. As they have been permitted to reduce the Court's docket to the cases deemed most important and have been provided with professional assistance, members of the Supreme

Court have been able to do extensive additional research into legal materials and adjacent factual background to supplement the briefs of counsel. Counsel in the famous *Myers* case,²⁴ for instance, decided in 1926, expressed amazement that Chief Justice Taft had been able to find much relevant material not discovered by counsel.²⁵ It has been said of Justice Brandeis, originator of the "Brandeis brief," that even when briefs were not inadequate, he "treated them only as a starting-point for investigation."²⁶ Other justices similarly range widely in the search for material.

That being true, we are left with the question as to the extent to which the adversary proceeding either is or ought to be the source of the specific decision and also of the frontier statement of the law. Is the ritual of argument before the Court one of shadow-boxing, as well as sometimes in the nature of the meeting of a committee? Would putting blinders on the Court by holding it to briefs and public arguments of actual litigants as the sources of decision be desirable in that it preserved the integrity of the adversary proceeding, or would it be disadvantageous in that it protected a proceeding no longer adequate to our needs where public as distinguished from private interests are concerned? On the other hand, if we must convert judges into members of committees composed of judges and counsel and into searchers and supervisors of research, are we distorting a traditional institution to perform a function that might better be performed by the legislature? These are legitimate and important questions for political scientists and for citizens generally.

Part of our difficulty in dealing with such matters lies in the fact that, however sharp and clear may be the posing of adversaries in courts of original jurisdiction where the facts as well as the law are to be determined, in appellate courts, which decide primarily questions of law, the adversary character of the proceeding sometimes seems to dissipate and the adversaries themselves at times seem virtually to disappear. To illustrate by a single case with which many of our profession are familiar, that of *Adamson v. California*²⁷ decided in 1947, the Supreme Court there pretty much lost sight not only of the widow with a

²¹ Clement E. Vose, "Litigation as a Form of Group Activity," *Annals of the American Academy of Political and Social Science*, Vol. 319 (Sept., 1958), pp. 29-30.

²² Rules of the Supreme Court of the United States, 346 U. S. 993-994 (1954).

²³ Order Adopting Revised Rules of the Supreme Court of the United States, 346 U. S. 945, 947 (1954).

²⁴ *Myers v. United States*, 272 U. S. 52 (1926).

²⁵ James M. Beck to William Howard Taft, Oct. 28, 1926, Taft Papers.

²⁶ Paul A. Freund, "Introduction," in Alexander M. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis* (1957), p. xvii.

²⁷ 332 U. S. 46 (1947).

penchant for public display of jewelry who had gotten herself murdered but also of the defendant, a Negro with the quaint name of Admiral Dewey Adamson, who had a highly efflorescent criminal record and hobbies which included collection of the tops of women's stockings.²⁸ Here the Supreme Court as a whole was primarily concerned with whether the Fourteenth Amendment gave protection against self-incrimination in a state court. Beyond that point, Justices Black and Frankfurter used the case as a medium for waging a doctrinaire battle over the extent to which the Bill of Rights was applicable to the states and over the merits of natural law reasoning, with Justice Black wielding a collection of historical materials to make his point, much after the fashion of assembling strictly legal materials in such a way as to contribute to a previously selected legal conclusion.²⁹ Although the case provided the occasion for elaboration of a judicial controversy which had been in ferment for some time, there is no reason for thinking that the justices, in this case as in many others, got much help for their intellectual product from the connection with the defendant under the death sentence.

IV

It is well here to reemphasize the point made in the beginning, that political scientists should study the Court in terms of its basic institutional pattern and reappraise from time to time its relation to the other branches of our government. In doing so we must realize that the "moment of truth" to be achieved by a group of nine men may come very differently and with far more difficulty than when it must come only to one judge sitting alone. Among the nine appellate judges, one may get his illumination primarily from the oral argument, another from the briefs, another from the discussion in conference, another from independent research, and still another from conversation with his law clerk or gossip with his secretary. But if perchance each has received, from some source, his own individual illumination, there remains the task of getting the synthesis, the *gestalt*, the totality of intellectual creation on the part of the group as a whole. Much

more than it represents the individual judge sitting alone in the court of original jurisdiction, the appellate Court of nine may resemble the committee structure wherein men talk and talk, from diverse angles, until finally light dawns in the mind of a possibly self-appointed spokesman and he launches forth with a statement acceptable to a majority of the group. It may be a long, long route from the arguments of opposing counsel to the synthesis finally achieved.

Does the decision remain nevertheless the product of the adversary proceeding? If it is so denominated, we must still remember that resemblance of the modified adversary proceeding to a parliamentary proceeding raises questions whether the law made through the decision should not more properly be made by an overtly legislative body, or even by a constituent assembly. For all the fact that it decides cases as cases, it is also notorious that the Court makes and announces public policy. The policy may be good or bad—that for the moment, though for the moment only, may be treated as an irrelevant matter. Take the policy, adopted in various degrees by various justices, of giving special protection to civil liberties. With the insight of a poet, Robert Frost has noted that to the extent of its support of such a policy the Court ceases to serve as a referee and becomes a handicapper. "No referee, no umpire, has a right to be a handicapper. He has no right to say the underdog needs a little help."³⁰ Responsibility for special protection, whether for the upper dog or the underdog, he contends, is for the handicapper, and belongs not to the Court but to Congress and the President.

At this point—departing from the technical analysis of a major aspect of the judicial process which is the primary task of this address—we are compelled to mingle with the discussion of institutions some appraisal of the kinds of policy being made by the judiciary on the one hand and by the other branches of the government on the other. In our governmental system a court operates within a safety zone only so long as it adheres to its rightful sphere of operations, the decision of cases and the incidental—clearly incidental—making of interstitial law. When, in the language of Mr. Frost, it takes sides and becomes a handicapper rather than a referee, it invites the public wrath poured out on some such occasions. If it becomes sufficiently partisan it destroys the pres-

²⁸ For details see the case in the California supreme court, *People v. Adamson*, 165 P. (2d) 3 (1946).

²⁹ For discussion of Justice Black's historical performance see Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?", *Stanford Law Review*, Vol. 2 (Dec., 1949), pp. 5-139.

³⁰ From a recording of a speech by Robert Frost, delivered at the Johns Hopkins University Poetry Festival, Nov. 13, 1958.

tige from which derives its judicial potency and jeopardizes itself as a court as well as a policy-making agency.

On the other hand, it is likewise true that in a democracy no institution exists merely to fulfill its own destiny, whether as a court, or a legislature, or an executive. It exists only to serve the people, doing so to the fullest extent possible under the Constitution and laws. The ultimate ends of society are more important than the pattern of any institution, and it is essential that those ends be served, even though the service is rendered only with considerable "play at the joints" among the several branches and instruments of the government. One of the major ends of our society is the maintenance of a regime of liberty as far-reaching as can be maintained without incurring the penalties of internal disorder or external danger. So it is that if in recent years the Supreme Court has gone to the outer fringes of judicial authority for the preservation of liberty, we should appraise its performance not merely in terms of an idealized conception of a court but also in terms of the performances of the other branches of the government in the same field. Nature abhors a vacuum. We need to ask what degree of idealistic leadership has been provided by Congress in this area. What, to take a single example, did the Senate do about Senator McCarthy, except censure him for violating the rules of the club—and doing even that only after he had been publicly discredited anyway? As for the executive branch, where and to what extent, to take a single issue, has it taken the lead in defending broadly the rights jeopardized by race prejudice, instead of waiting for the application of judicial pressure? Wherein during the last quarter of a century has it provided effective leadership for public opinion for the reshaping of benighted attitudes? And wherein, to shift to still other

areas of responsibility, have we seen an invitation to greatness either in state legislatures or among our governors?

Answers to these questions may well explain such judicial encroachment as may seem to exist. True, the salvation of democracy does not lie in having a judiciary protect us against ourselves. In a democracy the democrats must either rule or forfeit their birthright, and democracy implies leadership as well as slavish surrender of putative leaders to mass sentiment. The legislative and executive branches yield too much to the pressures of the hour, to the polls professionally or individually taken, to the beckonings of expediency, and seek too seldom within their own modes of operation the "moment of truth" that comes from the concentration of the capacity for thought and leadership on the part of elected representatives. While courts need watching, with praise and blame as the situation may require and in any event with penetrating and illuminating analysis, the tendency toward default of creative leadership is more glaringly apparent in the other two branches, with consequent invitation to judicial encroachment to fill the vacuum. There are obvious limitations on the rightful scope of the adversary proceeding as a device for achieving syntheses in the field of public policy, as distinguished from the mere decision of cases. But comparison of Supreme Court performance in recent years with that of legislative and executive branches, both in the federal government and in the states, invites drastic refurbishing within the political branches rather than extensive curbing of the power of the courts. Better understanding of the inherent nature of the judicial process, coupled with courageous assertion of democratic leadership where such leadership belongs, may well provide all that is needed in the way of limitation on the scope of judicial power.