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President Roosevelt and the Judiciary

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PRESIDENT ROOSEVELT AND THE JUDICIARY

In the campaign of 1912, Ex-President Roosevelt, then out of office, and a candidate for the Presidency, favored the recall of judicial decisions. This position, assumed some three or four years after leaving the Presidency, has sometimes been criticized as somewhat inconsistent with an earlier attitude held by Mr. Roosevelt as President. By way of limitation, it should be said that this paper will not attempt to examine Mr. Roosevelt's later utterances with respect to the judiciary. As chief magistrate, and head of a co-ordinate department, it is interesting and important to examine Mr. Roosevelt's official utterances with respect to the judiciary. In this way it should be possible to analyze a portion of the political theory of one of our presidents.

I

ATTEMPTS TO IMPROVE THE JUDICIARY

President Roosevelt keenly realized the necessity of adequate machinery if the Federal laws were to be enforced. Rather early in his first administration he importuned Congress to increase the appropriations of the Department of Justice for the enforcement of the Anti-Trust Law.¹ Again, a few years later he earnestly advocated reform in the administration of justice in the system of extra-territorial courts in the Orient.² His most pointed proposal for the improvement of the judiciary, however, is to be found in his advice to Congress to double the salaries of all federal judges.³

II

PRACTICAL DEVICES FOR SECURING JUSTICE

The President was very practical in his recommendations for devices to secure law enforcement when traditional methods failed to get results. When public sentiment could not be marshaled to support a program which consisted largely of civil

¹ *Message and Documents, 1902*, Vol. I, pp. 10-11. Annual Message to Fifty-Seventh Congress, Second Session, December 2, 1902.

² See *Messages and Papers of the Presidents*, Supp. Vol. II, p. 873. Message of January 13, 1905.

³ *Message and Documents, 1908*, Vol. I, p. 19. Message to Sixtieth Congress, Second Session, December 8, 1908.

suits against great trade combinations, the Department of Justice with Roosevelt's full approval brought criminal action against the guilty individuals.⁴ A law which could not be enforced in its entirety was repugnant to Mr. Roosevelt. If it could not be enforced in its entirety, repeal of the unenforceable portion seemed to him the proper alternative.⁵

III

THE INJUNCTION

As early as December 5, 1905, we find a recommendation to Congress that the procedure in injunctions be changed so that the judge must "give due notice to the adverse parties before granting the writ."⁶ Again the following year (1906) the President referred to the abuses of the injunction in no uncertain terms. He defined the injunction as a "necessary power" but lectured the judge who "uses it wantonly or oppressively." His chief concern seems to have been at this time the possibility that through misuse of the injunction the courts themselves would fall into disrepute.⁷

⁴ *Message and Documents, 1906*. Vol. I, p. 8. Annual Message to the Fifty-Ninth Congress, Second Session, December 3, 1906.

⁵ *Message and Documents, 1908*, Vol. I, p. 8. Message to Sixtieth Congress, Second Session, December 8, 1908.

⁶ *Message and Documents, 1905*, Vol. I, p. 18. Message to Fifty-Eighth Congress, Second Session, December 5, 1905.

⁷ "In my last message I suggested the enactment of a law in connection with the issuance of injunctions, attention having been sharply drawn to the matter that the right of applying injunctions in labor cases should be wholly abolished. It is at least doubtful whether a law abolishing altogether the use of injunctions in such cases would stand the test of the courts; in which case, of course, the legislation would be ineffective. Moreover, I believe it would be wrong altogether to prohibit the use of injunctions. It is criminal to permit sympathy for criminals to weaken our hands in upholding the law; and if men seek to destroy life or property by mob violence there should be no impairment of the power of the courts to deal with them in the most summary and effective way possible. But so far as possible the abuse of the power should be provided against."

"In this matter of injunctions there is lodged in the hands of the judiciary a necessary power which is nevertheless subject to the possibility of a grave abuse. It is a power that should be exercised with extreme care and should be subjected to the jealous scrutiny of all men, and condemnation should be meted out as much to the judge who fails to use it boldly when necessary as to the judge who uses it wantonly or oppressively. Of course a judge strong enough to be fit for his office will enjoin any resort to violence or intimidation, especially by conspiracy, no matter which his

In one message President Roosevelt indicated his belief that the courts themselves could best stem the tide of destructive criticism flowing against them by changing their tactics in the issuance of injunctions. This method of reform seemed preferable to legislative narrowing of the injunctive process, but due to its improbability he continued to recommend congressional action.⁸

One of the worst misuses of the injunction to which he referred was that of applying it to the "entirely proper and legitimate actions of labor organizations."⁹ It was not, however, until President Roosevelt penned his last annual message that he was ready to recommend to Congress a definite step in respect to the curbing of the injunctive process.¹⁰

IV

PUBLIC OPINION AND CRITICISM OF THE JUDICIARY

Roosevelt, quick to detect public sentiment, early in his administration gave heed to the charge that the law could not be invoked against wealthy offenders. He tried to bring about

opinion may be of the rights of the original quarrel. There must be no hesitation in dealing with disorder. But there must likewise be no such abuse of the injunctive power as is applied in forbidding laboring men to strive for their own betterment in peaceful and lawful ways; nor must the injunction be used merely to aid some big corporation in carrying out schemes for its own aggrandizement. It must be remembered that a preliminary injunction in a labor case, if granted without an adequate proof (even when authority can be found to support the conclusions of law on which it is founded) may often settle the dispute between the parties; and therefore if improperly granted may do irreparable wrong. Yet there are many judges who assume a matter of course granting of a preliminary injunction to be the ordinary and proper judicial disposition of such cases; and there have undoubtedly been flagrant wrongs committed by judges in connection with labor disputes even within the last few years . . . Such judges by their unwise action immensely strengthen the hands of those who are striving entirely to do away with the power of injunction; and therefore such careless use of the injunctive process tends to threaten its very existence, for if the American people ever become convinced that this process is habitually abused, whether in matters affecting labor or in matters affecting corporations, it will be well-nigh impossible to prevent its abolition." *Message and Documents, 1906*, Vol. I, p. 11. Message to Fifty-Ninth Congress, Second Session, December 3, 1906.

⁸ *Message and Documents, 1906*, Vol. I, p. 24. Message to Sixtieth Congress, First Session, December 3, 1907.

⁹ See *Special Message of January 31, 1908*.

¹⁰ *Message and Documents, 1908*, Vol. I, p. 24. Message to Sixtieth Congress, Second Session, December 8, 1908.

better law enforcement under existing laws but eventually decided that they were inadequate.¹¹ He was not so trustful, however, of the soundness of public opinion as it manifested itself in the jury box.¹²

To Roosevelt, the typical jury man was too lenient in the matter of meting out criminal penalties to malefactors in the business world.¹³ Roosevelt had no disposition to exempt the judges from public criticism.¹⁴ He felt that the best judges would welcome honest criticism.¹⁵ The American people, he thought, would never allow any public servant, not even a judge

¹¹ *Message and Documents, 1907*, Vol I, p. 23. Message to Sixtieth Congress, First Session, December 3, 1907.

¹² "The two great evils in the execution of our criminal laws today are sentimentality and technicality. For the latter, the remedy must come from the hands of the legislatures, the courts and the lawyers. The other must depend for its cure upon the gradual growth of a sound public opinion which shall insist that regard for the law and the demands of reason shall control all other influences and emotions in the jury box." *Message and Documents, 1907*, Vol. I, pp. 23-24. Message to Sixtieth Congress, First Session, December 3, 1907.

"For many of the shortcomings of justice in our country our people as a whole are themselves to blame, and the judges and juries merely bear their share together with the public as a whole. It is discreditable to us as a people that there should be difficulty in convicting murderers, or in bringing to justice men who as public servants have been guilty of corruption or who have profited by the corruption of public servants. The result is equally unfortunate, whether due to hair-splitting technicalities in the interpretation of law by the judges, to sentimentality and class consciousness on the part of jurors, or to hysteria and sensationalism in the daily press." *Message and Documents, 1908*, Vol. I, pp. 25-26. Annual Message to Sixtieth Congress, Second Session, December 8, 1908.

¹³ *Message and Documents, 1907*, Vol. I, p. 23. Message to Sixtieth Congress, First Session, December 3, 1907.

¹⁴ "Respect for the law must go hand in hand with respect for the judges; and as a whole, it is true now as in the past that the judges stand in character and service above all other men among their fellow-servants of the public. There is all the greater need that the few who fail in this great office, who fall below the high standards of integrity, of wisdom, of sympathetic understanding and of courage, should have their eyes opened to the needs of their countrymen . . . Nevertheless if he clearly fails to do his duty by the public in dealing with lawbreaking corporations, lawbreaking men of wealth, he must expect to feel the weight of public opinion; and this is but right, for except in extreme cases, this is the only way in which he can be reached at all. No servant of the people has a right to expect to be free from just and honest criticism." *Special Message of January 31, 1908*.

¹⁵ "The best judges have ever been foremost to disclaim any immunity from criticism. This has been true since the days of the great English Lord Chancellor Parker, who said: 'Let all people be at liberty to know

to be immune to public criticism.¹⁶ On the other hand the judges should ever conduct themselves in such a way as to inspire respect and not disapprobation.¹⁷ While approving just criticism of the courts, the President thought such criticism should proceed in an orderly and dignified manner. Criticism from fellow judges he thought was sometimes very beneficial.¹⁸ The action of certain labor leaders in attacking the courts, he felt was so undignified as to defeat its own purpose.¹⁹ In no sense should the judges be swayed by every agitation directed against them but should continue to fulfill their proper function of interpreting the laws.²⁰

V

PROCEDURE IN THE COURTS

The long delays in the court procedure particularly annoyed President Roosevelt. These seemed to him distinctly to the advantage of the well-to-do and therefore thwarted real justice.²¹ The safeguards necessary for the accused in the early days of Anglo-Saxon law appeared to have become in the twentieth century an impediment to justice.²² The practice of setting aside judgments of the inferior courts on technicalities seemed to be so productive of evil, that the President recommended legislation intended to terminate the practice.²³ He desired to strengthen the Federal courts, by securing the passage of legislation which would give the Government the right of appeal in criminal cases

what I found my judgment upon; that, so when I have given it in any cause, others may be at liberty to judge of me.'" *Message and Documents, 1906*, Vol. I, p. 12. Annual Message to Fifty-ninth Congress, Second Session, December 3, 1906.

¹⁶ *Message and Documents, 1906*, Vol. I, p. 14. Annual Message to Fifty-Ninth Congress, Second Session, December 3, 1906.

¹⁷ *Message and Documents, 1908*, Vol. I, p. 28. Annual Message to Sixtieth Congress, Second Session, December 8, 1908.

¹⁸ *Message and Documents, 1908*, Vol. I, p. 28. Annual Message to Sixtieth Congress, Second Session, December 8, 1908.

¹⁹ *Message and Documents, 1908*, Vol. I, pp. 19-20. Annual Message to Sixtieth Congress, Second Session, December 8, 1908.

²⁰ *Message and Documents, 1908*, Vol. I, pp. 24-25. Annual Message to Sixtieth Congress, Second Session, December 8, 1908.

²¹ *Messages and Speeches of the President*, Supp. Vol. II, p. 853. Fourth Annual Message. December 6, 1904.

²² *Message and Documents, 1905*. Annual Message to Fifty-Eighth Congress, December 5, 1905.

²³ *Message and Documents, 1906*, Vol. I, p. 10. Annual Message to Fifty-Ninth Congress, Second Session, December 3, 1906.

on questions of law. This he thought would make for more uniformity in the administration of justice, would eliminate conflicting decisions, would promote equality before the law, and would give the courts more dignity.²⁴

VI.

UNCONSTITUTIONALITY

Roosevelt, like many other advocates of social legislation, lamented the difficulty of amending the Constitution.²⁵ The decision in the *Adair* case²⁶ seems to have strengthened this pessimism. He referred to it as fraught with "very serious probable consequences."²⁷ Yet to his mind the judges were, after all, the chief lawmakers and for this reason he was concerned that they should have a twentieth century social and economic philosophy rather than an outgrown philosophy.²⁸ The judicial construction of "Liberty" often appeared to be mockery when

²⁴ *Message and Documents, 1908, Vol. I, pp. 25-26.* Annual Message to Sixtieth Congress, Second Session, December 8, 1908.

²⁵ *Message and Documents, 1906, Vol. I, p. 35.* Annual Message to Fifty-Ninth Congress, Second Session, December 3, 1906.

²⁶ *Adair v. United States*, 208 U. S. 161.

²⁷ "A very recent decision of the Supreme Court of the United States rendered since this message was written, in the case of *Adair v. United States*, seemingly of far-reaching import and of very serious probable consequences, has modified the previously entertained views of Congress in the premises to such a degree as to make necessary careful consideration of the opinions therein filed before it is possible definitely to decide in which way to call the matter to your attention." Special Message of President Roosevelt, January 31, 1908, to First Session of the Sixtieth Congress.

²⁸ "The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all lawmaking. The decisions of the courts on economic and social questions depend on their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy; which was itself the product of primitive conditions. Of course a judge's views on progressive social philosophy are entirely second in importance to his possession of a high and fine character; which means the possession of such elementary virtues as honesty, courage and fairmindedness." *Message and Documents, 1908, Vol. I, p. 24.* Annual Message to Sixtieth Congress, Second Session, December 8, 1908.

it related to contract. This was what he meant by an outgrown philosophy.²⁹ The limitations on the lawmaking proclivities of the courts, too, were realized by Roosevelt. Especially should public sentiment avoid the habit of expecting the courts to declare evil legislation invalid. The proper method in the case of vicious legislation he thought was repeal by regular legislative procedure.³⁰ His belief in popular sovereignty extended to the point that legislation supported by a popular majority should not be invalidated by the courts except when there was a "clear violation of Constitutional provision."³¹ The responsibility, however, for unconstitutionality sometimes was with the legislative department because of its slipshod methods of formulating its product.³² This was in part due to conscious legislative design.³³ Then, too, he realized the prominent share which competent counsel plays in aiding the court to detect such flaws.³⁴

VII.

THE COURTS AND POLICY

The courts should be awake to questions of policy, he thought, sometimes this should take the form of due deference to the clearly expressed will of the majority.³⁵ The entire subject of political questions is dismissed with the suggestion that judges should "hold sound views on questions of public policy."³⁶

²⁹ *Message and Documents, 1908*, Vol. I, p. 22. Annual Message to Sixtieth Congress, Second Semester, December 8, 1908.

³⁰ *Message and Documents, 1908*, Vol. I, p. 25. Message to Sixtieth Congress, Second Session, December 8, 1908.

³¹ *Message and Documents, 1908*, Vol. I, p. 25. Annual Message to Sixtieth Congress, Second Session, December 8, 1908.

³² *Ibid*, p. 27.

³³ *Ibid*, p. 27.

³⁴ "Our great clusters of corporations, huge trusts and fabulously wealthy multimillionaires, employ the very best lawyers they can obtain to pick flaws in these statutes after their passage." *Message and Documents, 1908*, Vol. I, p. 27. Annual Message to Sixtieth Congress, Second Session, December 8, 1908.

³⁵ See note 31.

³⁶ "But it is also true that judges like executives and legislators should hold sound views on questions of public policy which are of vital interest to the people." *Message and Documents, 1908*, Vol. I, p. 27. Annual Message to Sixtieth Congress, Second Session, December 8, 1908.

VIII.

EQUALITY BEFORE THE LAW

This meant something more than a matter of procedure. The real substance of it to Roosevelt was legal certainty and no delay.³⁷ It meant the protection of the black man from the savagery of a lynching mob.³⁸ It implied no distinction in substance between the fortunate and the unfortunate.³⁹ If the unfortunate classes were at a disadvantage in litigation with the great corporate interests, Roosevelt believed it the duty of the courts to take notice of such inequality in the substance of their decision.⁴⁰ This attitude of the courts was to be in no sense that of a crusade or to be in the form of a temporary movement but rather a permanent attitude which in the end would triumph over all lawlessness.⁴¹

³⁷ "Let justice be both sure and swift; but let it be justice under the law, and not the wild and crooked savagry of the mob." *Message and Documents, 1906*, Vol. I, p. 16. Annual Message to the Fifty-Ninth Congress, Second Session, December 3, 1906.

³⁸ "There is but one safe rule in dealing with black men as with white men; it is the same rule that must be applied in dealing with the rich men and the poor men; that is to treat each man, whatever his color, his creed, or his social position, with even-handed judgment on his real worth as a man." *Ibid.*, p. 3.

³⁹ "So that the Department of Justice may continue to be what it now is, in very fact the Department of Justice, wheresofar as our ability permits, justice is meted out with an even hand to great and small, rich and poor, weak and strong." Special Message, January 31, 1908.

⁴⁰ "The judges who have shown themselves able and willing effectively to check the dishonest activity of the very rich man who works iniquity by the mismanagement of corporations, who have shown themselves alert to do justice to the wage-worker, and sympathetic with the masses of our people, so that the dweller in tenement houses, the man who practices a dangerous trade, the man who is crushed by excessive hours of labor, feel that their needs are understood by the Courts—these judges are the real bulwarks of the Courts; the judges of the stamp of the President-elect, who have been fearless also in holding to strict account corporations that work iniquity, and far-sighted in seeing that the working man gets his rights, are the men of all others, to whom we owe it that the appeal for such violent and mistaken legislation has fallen on deaf ears, that the agitation for its passage has proved to be without substantial basis." *Message and Documents, 1908*, Vol. I, p. 21. Annual Message to Sixtieth Congress, Second Session, December 8, 1908.

⁴¹ "The war we wage must be waged against misconduct, against wrong-doing wherever it is found; and we must stand heartily for the rights of every decent man, whether he be a man of great wealth or a

IX

PRESIDENT ROOSEVELT'S ESTIMATE OF THE
JUDICIARY

In general, Roosevelt ascribed pure motives to the judiciary and had a high opinion of its work.⁴² Certainly the great majority of the judges held views and decided upon principles which were sound.⁴³ That there were some unwise judges he admitted.⁴⁴ The Supreme Court of the United States he held in the highest esteem.⁴⁵ It probably was genuine respect for the legal attainments of Secretary Taft that caused Mr. Roosevelt to point to him as the ideal judge. At any rate Mr. Taft embodied those principles which the President felt should be possessed by a good judge.⁴⁶

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man who earns his livelihood as a wageworker or a tiller of the soil." *Message and Documents, 1908*, Vol. I, p. 10. Annual Message to Sixtieth Congress, Second Session, December 8, 1908.

⁴² "On an average they (the judges) stand above any other servants of the community, and the greatest judges have reached the high level held by those few patriots whom the whole country delights to honor." *Message and Documents, 1908*, Vol. I. Annual Message to the Sixtieth Congress, Second Session, December 8, 1908, p. 28.

⁴³ "Every judicial decision involves two terms—one, an interpretation of the law; and the other, the understanding of the facts to be applied. The great mass of our judicial officers are, I believe, alive to these changes of conditions which so materially affect the performance of their judicial duties. Our judicial system is sound and effective at core, and it remains, and must ever be maintained as the safeguard of those principles of liberty and justice which stand at the foundation of American institutions; for as Burke finely said, when liberty and justice are separated, neither is safe." *Ibid*, p. 22.

⁴⁴ *Ibid*, p. 28.

⁴⁵ "It is not an idle boast of this country when we speak of the Court upon which Justice Harlan sits as the most important court in all the civilized world." See Speech at the Banquet to Justice Harlan at the New Willard Hotel at Washington, D. C., on December 9, 1902 in *Messages and Speeches, Supp.* Vol. I, p. 189.

⁴⁶ See note 40.