

# The new order in judicial rulemaking

*Factional politics is jeopardizing the federal rulemaking process. What is needed is an independent group to organize efforts to protect the rules in Congress and to provide a constituency for the Supreme Court in the exercise of its authority under the Rules Enabling Act.*

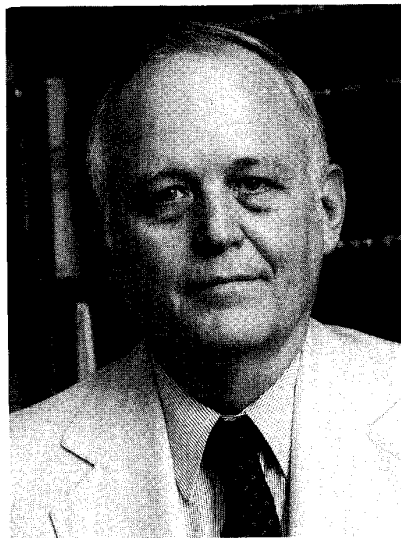
by Paul D. Carrington

I speak tonight of federal judicial rulemaking. I speak as one who has been occupied with the endless task of remaking the civil rules for almost six years. Although now a grizzled, or even outworn, veteran, I of course speak only for myself and not at all for the Civil Rules Committee or the Judicial Conference of the United States.

A substantial package of amendments to the Civil Rules will shortly be published for comment by the bench and bar. That package follows closely behind the larger but less significant package sent to the Supreme Court last year, much of which has now been promulgated. Together, those revisions are the product of about eight years of committee deliberation.

Although there is much in the forthcoming proposals that might be of interest, I will not speak of their substance. I will instead call attention to several events that have occurred on my watch as reporter, events that cause me to be mildly troubled about the future of judicial rulemaking and of procedural law reform more generally. I will conclude by importuning this Society to provide leadership in addressing my concern.

Because of the nature of the suggestion



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with which I shall conclude, it may be important for me to signal that I will subside as reporter in the not too distant future. If I should survive so long, I will see the current proposals through to their ultimate fate, but then expect to pass my torch to someone else with fresher thoughts and a fresh supply of good will and moral capital. Thus, I will be pleading tonight for your support of an enterprise not much of my own but of others.

The concern to which I will address a proposal is expressed in the current issue of the *North Carolina Law Review* by

Professor Linda Mullenix.<sup>1</sup> She asks whether the Advisory Committee that I have served since 1985 "is destined to go the way of the French aristocracy," arguing that the Federal Rules of Civil Procedure are in danger of sinking into a morass of factional politics.

While I do not think that I stand in the shadow of a guillotine, I affirm that our venerated tradition, rooted in the work of Jeremy Bentham, of Henry Brougham, of David Dudley Field, of Roscoe Pound, of Edson Sunderland, of Arthur Vanderbilt, and of Charles Clark is at increasing risk. That tradition of law reform was celebrated by Max Weber as an important emblem of the rationalization of social institutions, as an advance of the social order to a stage of organization enabling effective governance through the enforcement of law in the resolution of disputes. It is a tradition that has helped to bring American law and American courts to a level of social and political importance perhaps without parallel, with private enforcement now the primary source of effectiveness of much of our national law.

The hazard to which Professor Mullenix adverts is an old hazard. It is indeed the one that induced Herbert Harley to call the American Judicature Society into being in 1913. Harley thought that the revision of court organization and procedure by the several state legislatures had proven to be seriously deficient. He called our predecessors together

This article is adapted from an address to the American Judicature Society annual dinner on August 9, 1991, in Atlanta.

1. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991).

to "elevate and energize the administration of justice." Especially, he sought to resist the influence of factional politics on court organization and procedure.

In our Society's more recent 1981 statement of goals, we presume to serve as "an independent, objective voice," favoring "the ideals of fair and impartial justice for all." Even to our own ears, these words savor a bit of platitudinous commencement rhetoric. So likewise, of course, do the words of Rule 1 of the Federal Rules of Civil Procedure, which exhort our courts to achieve "the just, speedy, and inexpensive determination of every action." And, for that matter, equally platitudinous is the thought that no one should be denied life, liberty or property "without due process of law."

But I affirm Professor Mullenix's warning that these lofty expressions embody important values needing to be defended, even if they seem on utterance to be undebatable. While no one would deny the merit of those aims, they are decidedly secondary to many. Some contemporary literature questions whether judicial rule-making does not rest on a false premise that procedure is apolitical or neutral. If that were its premise, then it would be subject to the popular contemporary criticism that nothing can be neutral, that all is politics. Let me begin, then, with a few words on procedure as politics.

### **Guarding against factionalism**

It cannot be denied, I think, that the uplifted rhetoric of our Society, like that of Rule 1 or of the Fifth Amendment, collides with the practice of conventional democratic politics, especially so in a society and a government as complex as our own. Democratic politics is, among other things, highly pragmatic and places a low value on adherence to high flown statements of principle.

It was, of course, not precisely planned that way. Some of our founding fathers, Thomas Jefferson in particular, envisioned that the state legislatures and the Congress would be engines of service to the shared common interest by a moral elite elected by the people on the basis of their capacity for republican virtue. It was indeed this premise that led Jefferson and others to establish law as an academic discipline in American colleges and universities; their purpose was to develop virtuous political leadership.

Jefferson and others hoped and believed that the virtue or habit of making political decisions conforming to the shared, common, public interests such as those expressed in our statement or in Rule 1 could be nurtured in colleges and universities and thus made to predominate over factional interests in the conduct of democratic politics.

No one, not even the great optimist Jefferson, doubted that civic or republican virtue is an elusive trait. It seems likely that even he would have agreed with Franklin who said, with his accustomed cheek:

There is no science, the study of which is more useful and commendable than the knowledge of the true interest of one's country; and perhaps there is no kind of learning more abstruse and intricate, more difficult to acquire in any degree of perfection than this, and therefore none more generally neglected.

James Madison, and many other founders, while sharing Jefferson's hopes for democratic legislation, were more skeptical. They feared, as Montesquieu had warned, that democracy would choke on factionalism, descending quickly into chaos, from which despotism would arise. It was such fears, of course, that gave rise to our Constitution. Since 1787, our courts have been on guard against the failures as well as the excesses of factional politics, and they have been joined and supported in this endeavor by the enterprise of academic law.

Our courts were thus destined from the beginning to be important political institutions, as were our law schools. The aspiration and the role shared by these institutions was to balance the influences of factional interests manifested in the work of other organs of government, to celebrate the values and traditions that we hold in common. The paramount role of courts in our tradition is to earn and keep the trust of the whole public, perhaps especially of those most likely to be hostile or alienated from the democratic polity. Essential to the performance of that role is the practice by the courts of classical civic virtue, of being and seeming to be impartial, disinterested, independent of faction, or at least partaking of those traits within the limits of human capacity. Is such disinterest not the charge given them by the Fifth Amendment's injunction against

takings without "due process of law?"

It is of course nonsense to say that procedure is not political, just as it is nonsense to say that our courts are not political institutions. But the politics embodied in sound procedure is a celebration of some of those political ideas that all of us hold in common. Procedure is part of the structure that all of us hope that our political institutions will generally abide. It is, like the forms of judicial independence, a means by which we reduce the factional political commitments of judges in order to gain the trust and acceptance of those who are disfavored by the controlling law.

In contrast, our legislatures serve as forums of faction. In their corridors, it is, at least within undefined limits, appropriate and respectable to voice special interest. There, such interests can compete openly in a process of negotiation and compromise. Resolution of factional conflict is, of course, an essential function of democratic government. I speak no ill of a politically accountable democratic legislature to say that it is responsive to opinions manifested through political organization, nor to say that legislative bodies have few occasions to practice "due process of law."

What Herbert Harley recognized that led him to circulate a call to his co-founders of this Society, is that factionalized democratic legislative bodies sometimes serve factional interests at the expense of the shared, public interest, and may be especially prone to do so when making laws governing legal institutions themselves. The reason for this deficiency of the conventional democratic legislative process was already well understood in Harley's time. Given a choice or an opportunity, most factions will try to claim the judiciary not only to control the selection of judges, but also to bend court administration and procedural rules to their own advantages. What vibrant political organizations want is not good procedure or due process, but victory for the interests they represent.

### **Concern for the public interest**

Alas, there is on the other hand no natural and effective lobby for sound judicial administration, no political force that regularly favors impartiality or disinterest. Judicial institutions, like the shoemaker's children, are unshod when they

walk the corridors of legislation. When one sees the representatives of the Third Branch on Capitol Hill, one is prone to wonder, how many divisions has the Pope? What is everyone's concern, as the old saw has it, is nobody's business.

Thus, American legislative codes of practice and procedure tend to be decorated with special-interest amendments reflecting momentary impulses of particular political organizations. And times of crisis for judicial institutions seldom call forth thoughtful legislative responses, not because legislators are indifferent to the welfare of the courts but because corrective action is often seen to jeopardize the interests of one or more organized factions. The influence of those factions overbears that of the mere do-gooders whose only stake in the matter is a concern for the public interest. That is why, as Arthur Vanderbilt put it, judicial law reform is no sport for the short-winded. Moreover, for obvious reasons, legislative solutions to the problems of courts are prone to favor those factional interests that are best organized, thus reflecting the procedural preference of those whom Marc Galanter has aptly described as "repeat players." This adds to the advantage already held by such litigants.

There are, to be sure, moments when public attention can be focused on institutional matters, and political energy is available to correct critical shortcomings in our institutions. The era following the Revolutionary War was the most notable such time in our national history, but 1848 in New York was another. On the other hand, what followed in New York after 1848 made vivid the deficiency of legislative making of procedural rules. Every time the legislature sat, it would adopt another hat-full of special-interest amendments to the Field Code, marring its clean, simple text finally beyond recognition. By Harley's time, the Field Code had become the Throop Code, grown from 88 sections to over 1000, making it a legal text of truly Byzantine complexity, a stellar trap for the unwary, and a source of mischief to hapless litigants.

Already in Harley's time, judicial rule-making had made its appearance and was recognized as a possible means of correcting the deficiencies of democratic legislation in the making of adjective

## **There is no natural and effective lobby for sound judicial administration.**

law. The idea was first adopted in England in 1873, the very mother of Parliaments relinquishing some of its power over the judiciary. The American Bar Association had organized in 1878, and very shortly thereafter fastened on the idea of uniform national rules to be promulgated by the Supreme Court. The first acceptance of judicial rulemaking in America came in 1890 in the original Constitution of Wyoming. By 1934, many states had embraced the idea. In that year, as we all know, a half century of effort by the ABA resulted in the enactment by Congress of the Rules Enabling Act.

There was, of course, resistance. It is doubtful that anyone ever regarded the judiciary as a perfect venue for making adjective law. Even judges who, despite the efforts of this Society, are elected at partisan elections, are not easily held to account for their misjudgments. Those of populist bent were quick to recognize that court rulemaking removes issues of importance from the political arena, immunizing them in substantial measure from the control of organized factions. Also, it is likely that rules made by courts tend to be centered on the interests of the judges, interests that are not necessarily identical with the public interest.

For these reasons, and also because he favored localism in procedure, Senator Walsh of Montana was one sturdy oppo-

nent of rulemaking. When he was named attorney general in the Franklin Roosevelt administration, it was presumed that no rules-enabling legislation would be forthcoming during his tenure. But he celebrated his appointment by marrying a gorgeous young lady, an event resulting in his sudden death in a railroad berth while on his honeymoon. And so Homer Cummings became attorney general, and we got the Rules Enabling Act.

The Court, of course, did not itself participate in the drafting of the rules, but, after a brief period in which work on the Civil Rules proceeded in the Justice Department, the task was turned over to a distinguished advisory committee that worked quietly for 18 months to produce a finished product promulgated by the Court with very little public discussion. The rules so produced have been, as you know, widely emulated in state systems. As Geoffrey Hazard put it, the rules may be Bleak House, but everyone seems to want to live there. Most states have not only copied many or all of the rules, but have adopted judicial rulemaking if they had not previously done so. Congress quite thoroughly butted out for decades, seemingly pleased to enjoy the more effective enforcement of the national law resulting from the availability of discovery at the initiative of the parties and other innovations of 1938.

As Judith Resnik has pointed out, no procedural system is proof against the corrosive effects of strong adversary initiative. Parties seeking to gain an advantage will sooner or later find the weakness in any system and use it for their private purposes. For that reason, amendments are a permanent need.

Thus, by 1970, it was clear that discovery as established in the 1938 Civil Rules was a mixed blessing, useful not only to uncover evidence of wrongdoing, but also an effective tool for imposing costs on adversaries. The environment had been changed. Among the changes were: interrogatories could be mass produced by the automatic typewriter; the amount of information stored and available had increased exponentially; and the advent of hourly billing had altered the incentives of attorneys.

### **The congressional role**

Congress was aroused by the advent of

the Federal Rules of Evidence leading ultimately to their enactment in 1975 as legislation rather than as rules of court. Not only did those rules elevate the interest of Congress, they also seem to have elevated the cost of civil litigation by enlarging the use of expert opinion. Civil trials have steadily grown in length. The once-standard one-day trial is now almost rare. One judge informs me that civil litigation is now often a competition in trained seal acts, with the trophy going to the side whose alleged experts bark best.

For two decades there has been increasingly shrill complaint about the cost of federal civil litigation that is now at crescendo. The 1983 amendments to the rules reflected a response of the judiciary, which has been to play a more active role in management of cases. How much this changing role has actually reduced costs is uncertain. It has generated critical comment by the more ardent devotees of the adversary tradition, but it can scarcely be denied that the valued tradition has seemed less admirable as increasing numbers of litigants and litigators have resorted to "scorched earth" tactics designed to magnify the litigation costs of persons they see as their enemies.

In 1988, the hue and cry was heard in the corridors of the Brookings Institution. In 1990, Senator Biden secured enactment of a bill intended to promote speedier civil justice. In 1990, also, we find the Federal Courts Study Committee preoccupied with the cost of civil litigation. And, in 1991, the Executive Branch is taking the initiative to urge greater economy in civil litigation as part of its efforts to ensure competitiveness.

Meanwhile, of course, the Congress and the president continue to enact drug legislation that otherwise fully occupies many federal courts. In combination with speedy trial statutes, many federal judges find it extremely difficult to find docket space for civil cases. One recently informed me, for example, that at a pre-trial conference a federal prosecutor predicted that it would require over four years for him to present his case, brought against dozens of conspirators whom he charged with 15 murders committed in different places at different times over the last decade or so. Obviously, no modifications of the civil rules can serve the need for economy in a court required to

give priority to such proceedings arising from the war on drugs.

Moreover, it seems clear that the problem of legal costs is primarily one of substance, not procedure. Where substantive outcomes are made to turn on issues of fact, or on the exercise of discretion informed by open-textured laws, legal costs will be high. Neither the executive nor the legislature has often seemed disposed to address substantive sources of legal costs. To do so would apparently be politically inept; it is politically costless to call for procedural reforms. For these reasons, civil justice in the federal courts is today more vulnerable than it has ever been to impositions by factional interests.

This vulnerability was evident as early as 1982 when Congress for the first time since 1938 forestalled a draft revision of a civil rule that had been promulgated by the Supreme Court. It is not unfair to say that the cause of congressional intervention on that occasion with respect to Rule 4 was the lobbying effort conducted by the National Association of Process Servers, who objected to the use of registered or certified mail. Their interests prevailed over those of rulemaking, leaving us to imagine what the American Association of Retired Persons or the National Rifle Association might be able to do to the rules if motivated. It deserves note that the efforts of Congress in drafting a revision of Rule 4 did not receive high marks. Kent Sinclair has described the rule as enacted to be "pregnant with difficulties."

### The rulemaking process

Partly in response to the 1983 amendments, but especially to a proposal made in 1984 to amend Rule 68 to deter non-settlement, Congressman Robert Kast-enmeier, then chair of the House Judiciary Committee, took an interest in the Rules Enabling Act. He proposed to revise the Act, partly in response to suggestions from Professor Steven Burbank and others, to make federal judicial rulemaking more open to public view and thus more responsive.

Anticipating Congressman Kastenmeier's bill, the rulemakers held public hearings on proposed amendments. And, beginning with my term as reporter, the Civil Rules Committee has circulated even very preliminary drafts to scholars,

lawyers, and bar groups willing to offer criticism. In addition, as reporter, I have met on occasion with interested bar groups to get their reactions and ideas on pending issues. This practice is a significant change from earlier practices. I have been told by one of my predecessors, the late Al Sacks, that he was instructed to keep his work entirely under wraps until the committee was prepared to make a recommendation. This practice reflected, of course, the traditions of judicial institutions accustomed to keeping their adjudicative deliberations to themselves.

In 1988, the Rules Enabling Act was amended to prescribe not only openness, but extended periods of deliberation. Rules can now be effective on December 1 of a given year only if they are promulgated by the Court before May 1 of that year. For the Court to act in that time, the Judicial Conference of the United States must make its recommendation at a meeting in the early fall of the preceding year. Even that was perhaps insufficient notice to the Court of the large package of amendments sent to it in 1990, for some of those were not promulgated before May 1 and were withheld for further deliberation, so that if adopted their effective date will be in late 1992.

To permit the Judicial Conference to make its recommendations to the Supreme Court in the fall preceding promulgation, its standing committee must approve the proposed amendments at its summer meeting; this, in turn, requires that the recommendations of the advisory committees be formulated at their spring meetings at least 18 months before the effective date of its recommendations, if approved.

But of course the advisory committee recommendations cannot be formulated until after the six-month period of public comment required by the 1988 Act. That period can begin only after the standing committee has approved the drafts for publication, and the approval can occur no sooner than the summer meeting a year earlier than the meeting at which the drafts are given approval for promulgation. A draft must thus be proposed for publication by an advisory committee at least two and one half years prior to its effective date. Even the most technical of amendments requires some period of drafting and review by the

committee, and so three years is the minimum period for the revision of a federal rule to be carried through its nine stages of gestation.

In fact, the time required for a significant amendment is now much longer. Thus, in 1985 Judge William Schwarzer proposed revisions of Rule 56. The Civil Rules Committee promptly decided to consider those proposals and directed me to see if additional ideas about summary judgment could be derived from the literature. Drafting and redrafting ensued; a draft was published in 1989; that draft has been revised in light of comment and is now to be republished; if the new draft is promulgated in due course, it will become effective on December 1, 1993, only eight years after I was instructed to work on it. Meanwhile, of course, the Civil Rules Committee will have undergone a complete turnover of personnel.

### **Influencing the process**

The 1988 Rules Enabling Act setting forth this schedule of deliberation was signed on October 7 of that year. On October 21, an omnibus drug bill was signed. That bill carried a rider proposed by Senator Daniel Inouye that effected an amendment of Rule 35. Senator Inouye wanted the rule revised to allow a court to order mental examinations conducted by licensed clinical psychologists. It was perhaps pertinent to his interest that his daughter-in-law is a clinical psychologist in Hawaii. His proposal had been considered by the Civil Rules Committee and in substance approved. But, as I was informed by the senator's staff, he was unwilling to await the lengthy rulemaking process. And so his amendment became effective without any public notice whatsoever, in seeming defiance of the provisions of the Rules Enabling Act adopted only 14 days earlier.

While the senator's rider was substantively innocuous, it is an excellent example of the kind of legislation that turned the New York Field Code of 1848 into a monstrosity. And Senator Inouye is not alone in responding to constituent desires to amend federal rules. Every term, numerous special interest bills are proposed as amendments of the rules. My favorite example is one twice-introduced that would amend Rule 8 to require plaintiffs claiming compensation for asbestos to attach to their complaints a sam-

## **Openness of the rulemaking process may encourage factional politics.**

ple of the allegedly injurious material.

### **The rise of interest groups**

Meanwhile, it is the point of Professor Mullenix that the openness of the process as rulemaking has been conducted since 1985 may encourage factional politics. It does seem likely that one reason for the absence of factional politics in 1938 was that the rules were drafted in secret over 18 months and promulgated after only a brief period of public comment for which the public was scarcely prepared. There was not sufficient notice and time for interest groups then active to identify ways in which they might be adversely affected by the new rules and then organize to make their views known to Congress. Factional politics was defeated by an undemocratic fait accompli conducted in the name of the Supreme Court.

For better or worse, that can't happen anymore. A wide array of factional interests and organizations are actively watching our efforts and striving to influence the process. We see and hear from employer organizations and groups representing employees, from products liability defendants and from ATLA, from the securities industry and from its adversaries, from the Justice Department and from regulatory commissions. Perhaps most outspoken of all are the court reporters who resist modification of rule 30 to allow the taking of depositions without requiring their services. We now even hear from foreign embassies, which

may be the reason that the Supreme Court has delayed action on recommendations bearing on the interface of the civil rules with the Hague Conventions.

There is a large benign consequence of this activity, one that is not fully acknowledged in Professor Mullenix's article. Many communications received from special interest groups are helpful to rulemakers, as they may be in any lawmaking context. This is especially so to the extent that comments are rooted in shared public concerns rather than particular interests. Many of the groups who study the rules and comment on published drafts are not organized around the interests of particular litigants and are themselves primarily interested in helping the rules committees pursue their aim of just, speedy, efficient determination of every case.

At the same time, it is useful to hear even from selfish interests. I recall that the most effective advocate of highway safety for many decades was said to be the lobby of the railroad industry. Selfish interests can and do make good suggestions.

Still, genuinely selfish interests are likely to get short shrift in rulemaking discussions. While Professor Mullenix expresses concern that the rulemakers may yield too freely to coercive lobbying, I do not share that concern. Most members of Judicial Conference committees are Article III judges who are not likely to bend to self-interested demands. At such times, one can observe and appreciate the value of judicial independence.

At the same time, it is a good thing that rulemakers be confirmed in their understanding that they are not the 800-pound gorilla that can sit wherever it pleases. Indeed, if a special interest group correctly states that it has a large and particular interest in the text of a rule, that serves as a useful caution to rulemakers that they should be alert to the risk that a rule may be substantive and hence invalid under the Rules Enabling Act, even as it was written in 1934.

The troublesome aspect of this process thus lies not in the flow of information from factions to the rulemakers, but in their relation to Congress, brought so clearly into focus by the successes of the National Association of Process Servers and of the clinical psychologists of Hawaii. If Congress is responsive, as is its wont, to every faction in the United

States that detects a possible stake in a proposed amendment to the rules, the rulemaking tradition is doomed to disintegrate. Professor Mullenix suggests that by engaging in dialogue with all manner of factions and by giving them ample time to organize we may be in effect preparing those who are disappointed for a climb up Capitol Hill. And it may be too much to ask that Congress simply turn its back on its constituents.

If Mullenix is right, and she may well prove to be, then there is clearly needed at this time an organizational structure lending political support to the rulemaking process. Because the Rules Enabling Act requires affirmative steps by Congress to derail an amendment, the rulemaking process can be shielded from factional politics, provided that there are people and groups willing to stand up for it.

The one organization having the political clout to protect rulemaking from factional politics is the organization that called rulemaking into existence in 1934, the American Bar Association. Indeed, it was astonishing how effective a few words from the Litigation Section, uttered by Ben Civiletti as its chair, were in providing the support needed by Senator Howell Heflin in dealing with the narrow and minor issue of supersession at the time of the 1988 Act.

But that was an episodic event. To deal with what has become a substantial flow of factional claims, a counter-organization could play a very important role. It is, I believe, the kind of role that Herbert Harley had in mind when he called the American Judicature Society into existence in 1913.

### Need for a monitor

Specifically, what I have in mind is a stable activity of this organization. I imagine a fairly large committee, perhaps as many as a couple dozen persons having not only an interest in the rules, but also a substantial presence in the American Bar Association and other bar organizations such as the American College of Trial Lawyers; and perhaps those local organizations who have a tradition of concern with law reform issues, such as the Association of the Bar of the City of New York. It would be the primary function of this group to organize and orchestrate efforts to protect the rules in Con-

gress and to provide a constituency for the Supreme Court in the exercise of its authority under the Rules Enabling Act.

To be effective, this group would need to be carefully selected and its members would need to serve over a substantial period of time so that they can follow revisions through the extended process. The group could use its antennae to advise the rules committees if it appears that a particular proposal is likely to arouse overwhelming concern in Congress. It would not otherwise, I should think, be a function of this group to advise the rules committees on proposed changes, although its members would certainly be encouraged to make individual suggestions and comments. My reason for this suggestion is that a group having adopted a position with respect to a particular proposal would be less able to lend institutional support when a different proposal is promulgated by the Supreme Court. Members of the group would receive copies of all drafts circulated by the reporters and also copies of any bills introduced in Congress to amend the rules.

I should not think that such a group would need to meet long or frequently, except at times of possible crisis. An annual meeting of a few hours with the chairs and reporters would normally suffice and might be held at the time of the AJS annual meeting. The group would be much more effective if it could enlist the services of a part-time staff, presumably a law teacher, who would be assigned a professional duty to monitor events and alert members to brewing issues. It might also from time to time call upon the research arm of the Society for assistance. It would be essential that the chair of this group be a person well known and regarded in the bar and also, if possible, on Capitol Hill.

I have fleshed out these few details only to bring my suggestion into focus. I do not presume to tell AJS or any group that it might select to perform this function how it should proceed. I call upon AJS to undertake this mission, partly because it is a rare union of judges and lawyers, state and federal, having the wherewithal to perform it, and also because, it seems to me, that this is precisely the kind of task that the Society was created to perform and should perform.

I note in closing that we have come a

very long way since 1906, the year that Roscoe Pound delivered his famous address to the American Bar Association. At that time, you will recall, there were even efforts to suppress publication of his remarks because they were seen to threaten the livelihoods of litigators. More than a few members of the bar saw their organizations—much as avid hunters see the National Rifle Association—as their very own hired gun. There was, of course, always the edge of self-interest in the efforts of the Association to secure adoption of the Rules Enabling Act, for it was expected to serve, and did serve, to advance the interests of the elite of the bar at the same time that it served to unite the nation's lawyers. Yet over time, while it is still no paragon of selfless devotion to the public interest, the profession has visibly ascended in its aspirations and in its ability to attend to the public's needs.

The American Judicature Society has contributed to that evolution of the American legal profession. It seems to me, and it may seem to you, that we are now living in a time when it is more difficult to maintain that development. Christopher Lasch spoke a decade ago of a culture of narcissism that elevated self-aggrandizement to acceptance and even approval. Most recently, the *London Economist* has remarked that contemporary Americans seem to be highly permissive in evaluating their own conduct and entitlements and highly puritanical in evaluating the conduct and rights of fellow citizens, thereby reversing those standards and departing from the self-discipline and tolerance that can make a democratic society work. If such observers are right, then it seems that this is an especially suitable time for the profession to summon its own reserves of altruism and to call upon other factions to rediscover theirs. I can think of no group better suited to lead the profession in that direction than the American Judicature Society. □

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