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Herschel H. Rose

West Virginia Supreme Court of Appeals

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THE BAR AS A GOVERNING CASTE*

Herschel H. Rose**

This far-fetched and utterly inappropriate subject is accounted for by the fact that I subscribe in spirit and literally to that canon of judicial ethics which forbids one on the woolsack to discuss controversial subjects. Hence the topic, and hence the superficial and sketchy discussion thereof.

Some ten or fifteen years ago there came to my home town of Fairmont a certain wise man. He was indeed a very wise man, for was he not a professor in a great metropolitan University? And had he not been in the United States some five or six years? And could he not speak English so that it was very largely understandable? Therefore, was he not abundantly qualified to advise and reprove the people of this country on all public questions? And this wise man made oration unto us. He prefaced his lecture by the trite observation that the nations of mankind had from the beginning of history been dominated, and ruled, absolutely by certain small groups or castes, particularly by the priests, the soldiers, the landowners, the nobility, and the merchants in turn. He then explained to us, as an original discovery by himself that in the United States of America there had developed the remarkable phenomenon of a great nation ruled by an entirely new caste, to wit, the lawyers. This discouraging diagnosis, he followed by his own hopeful remedy. On the wall he wrote, figuratively, "Mene, mene, tekel, upharsin"—"You lawyers have been weighed in the balances and are found wanting; your kingdom is about to be

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** Member of the West Virginia Supreme Court of Appeals.
taken from you and delivered to—mirabile dictu—"the college professors." Actually his statement was that the science of government, like the science of law, medicine, divinity, engineering and all others should be taught and directed by the universities, and that university professors should become practical leaders in all governmental activities.

Of course, we applauded his lecture, as good manners required, we laughed at his foolishness and sneered at his impudence, until, two or three years later, we lifted up our eyes and saw marching around the throne a great multitude, which no man could number, headed by Prof. Moley, Prof. Tugwell, Prof. Frankfurter, Prof. Arnold and their comppeers. We then awarded the wise man from the east a rehearing on the ground of newly discovered evidence. Let us, therefore, for a few minutes consider the good professor's philosophy.

It may not be correct to state that the lawyers of America have literally ruled the nation, but it cannot be denied that men of the legal profession have from the beginning occupied positions of power and honor far beyond that to which their numbers alone would entitle them. In the nation and in the states, government is divided like Caesar's "omnia Gallia" into "tres partes", and one of these parts, to wit, the judicial department, has been delivered universally and continuously to the members of the legal profession. This monopoly of one of the three great departments of government would in itself be far more than the lawyers' share in government, if numbers alone were considered. But a domination amounting almost to an equal monopoly has existed in the executive department. Of our thirty-one presidents, twenty-three have been lawyers, and the other eight have been distributed among other professions and occupations as follows: three generals, two engineers, one tailor, one editor, and one who liked to call himself a mere politician. Of our twenty-one West Virginia governors, sixteen have come from our profession, and a like situation prevails in all other states. And, as though this were not enough, there has probably never been a Congress and probably never a legislature in any state in which the lawyers have not been at least a plurality. There have been two periods in the history of the United States when government for all practical purposes consisted in a dictatorship of the legislative department: first, that period called by Theodore Roosevelt the "era of little presidents", when the Senate ruled the nation, led by Webster, Clay, Calhoun, Benton, Cass, Crawford,
Corwin, Davis, Tombs, Yancey, and they all of them, were lawyers; and, second, the period immediately following the Civil War, when the Congress made both the executive and judicial departments of the government helpless under the leadership of Sumner, Wade, Stevens, and Butler — lawyers all. Congress, when master of the nation, — both when in the zenith of its parliamentary glory and when in the nadir of its infamy — was lawyer led and controlled. Hence, we can either boast or confess, as in our opinion, the case requires, that the legal profession, although not probably ruling the country, has by far exceeded all other groups of citizens in its prestige and power in the government as administered in the United States for a century and a half. Lawyers have been as prominent in the government of the United States as generals in the Latin republics, or merchants in medieval Venice, or preachers in colonial New England.

Moreover, this political leadership or dominance of the bar can be found only in America. Even in England, from which we politically and governmentally descend, the legal profession has never been accorded such precedence. Consider her best-known names. Lloyd George was a lawyer and so were Carson and Asquith, and Campbell-Bannerman, and Melbourne, and the younger Pitt. But Churchill is not of the bar, nor was Chamberlain, nor Maedonald, nor Baldwin, nor Bonar Law, nor Balfour, nor Salisbury, nor Roseberry, nor Gladstone, nor Disraeli, nor Russell, nor Palmerston, nor Peel, nor Canning, nor Wellington, nor Chatham, nor Walpole. The political flowering of the legal profession has reached its perfection only in America.

And thus the lawyer was, but thus he is not. Nonlawyers are at least challenging the primacy of the bar in government. Of four presidents elected since the first World War, two are not lawyers. Of the six defeated candidates for the presidency since the World War, only two have been from the bar. The last two presidents have called fewer than half of their cabinets from the legal profession, while half a century ago the bar almost monopolized the cabinet positions. The great diplomatic posts have gone to nonlawyers; the principal subordinate executive positions are similarly filled. The leaders of the House and Senate come more and more from other fields. The lawyer is, clearly, in political decline.

Causes innumerable of this situation suggest themselves to a reflective mind: the loss of prosperity in private practice; the failure of the lawyer-led government to be one hundred per cent
perfect to all men; the rise of other professions; the distrust of a legalistic theory of government. Give these, and all other answers, such weight as you may think proper. To my mind there are just two complete and comprehensive explanations for the ascent and relapse of the lawyer in governmental affairs of the United States. One of these is that ours is a government of law. When law (including the Constitution) was popular, the lawyer flourished, and when the Constitution and law came under a cloud, the political prestige of the lawyer suffered likewise.

America may not be entitled to be considered the inventor of constitutional government as the term is used in modern times; but it was in America that this type of government had its first spectacular and dramatic practical demonstration of success. A government based on freedom under law, in which every citizen, however humble, was protected by law clearly defined and written down, and in which every official and every group of officials—the president, the Congress, the courts—were controlled absolutely by the written Constitution, and that Constitution, subject to correction from time to time as the wisdom of the people as a whole might formally and legally determine! This monumental concept of government, demonstrated here to be workable, was the supreme gift of America to modern civilization. It set the world afire one hundred and fifty years ago, as communism has done in the present generation. It shook every throne on earth, overturned many, and changed the power of all. There was not a new government set up anywhere in the world for that century and a half, which did not take our government for a model. Republics and constitutional monarchies became the universal rule among civilized people. Free government under law was the battle-cry of the world. Then over all this, came the supreme conception of a world in which nations should be governed by compacts and treaties, called international law, enforced by tribunals which were to be above and beyond all kingdoms, republics and empires.

A conception of tremendous grandeur! And who its author? This whole stupendous theory, at least partially carried into practice in America, proceeded from lawyers and men of legally trained minds. It was they who conceived and perfected this theory of government and set it to work. 'And it was set to work first in America, and by American practitioners of the law. The United States became the Kitty Hawk of constitutional government and the inventors and settersup of the system became, by natural process,
its operators. Hence, the primacy of men of our profession in governmental affairs in our nation.

But why has our glory departed? Why has power slipped from our grasp? Why are others sitting in our chairs in high places? I believe that the answer is equally apparent. We are living in a time when the words "constitution" and "law" are no longer talismans in our own country, and when they are utterly abhorred throughout a very large part of the world. With the subsidence of the principle of government by law, the lawyer fell from his high estate.

The first collapse came in international law. Some German uttered the words "scrap of paper" and the whole fabric of international law vanished as a bubble bursts. France and England for a time inveighed against the infamy of Germany, but later, without a blush or apology, repudiated their solemn bond to repay an ally which came to their succor as they stood on the brink of national annihilation. Across the sea the most solemn compacts among nations and the most fundamental of international usages are of no more binding effect than the treacherous whispered word of a Talleyrand or a Metternich a hundred years ago.

At home events conspired to bring law into questionable respect. It became smart and fashionable to defy and deride a certain unpopular constitutional amendment. A like disrespect rapidly extended to law in general. Manners and moral laws became contemptible. Domestic discipline, school regulations, and even rules of eleemosynary and penal institutions became unenforceable. Moreover, the public began to waken from the delusion (never cultivated by our profession) that laws could cure all evils, and to lose confidence in the lawyer's only remedies for wrongs, namely, new laws or lawsuits. Further, they took note of the fact that the greatest social activity of our day—the labor movement—was able to function largely without the law or the courts. Tribunals were created in the land in lieu of courts, which required no legal assistant for access and hearing. And finally the public was shocked to find that the Constitution of the United States, the greatest single item of law in the world, might be not absolutely perfect. On the platform, the stump, in the pulpit and the press, the legal formalities and formal procedure of the courts, which the profession knows to be the most vital to business, government and justice, were called "technicalities", and law, as such, became as unpopular as the Judean dogmas against which St. Paul inveighed.
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in the long ago. But law was the lawyers' stock-in-trade, and when law came to be considered contemptible or futile the lawyer also lost his prestige at the capitol.

A second contributing cause toward the unpopularity of a government by lawyers has been the rise in the world of a wholly new philosophy of government and the functions of government. There are fashions in government as in all other activities of civilization. At present fashion or style in government runs to communism and facism. The spread of these fashions can no more be prevented than the spread of any other fashion. These doctrines infiltrate into our country just as our theories entered all countries of the world a hundred and fifty years ago. Consciously, or unconsciously, our people absorb the thoughts which are now moving the world. Even the best of our people, who are capable of performing the act of thinking, may pause and wonder whether, with so many of mankind believing otherwise, it may not be true that our method of government—the lawyers' government—is less than absolutely perfect.

A more serious fact—a very practical and unavoidable fact—is that there has come into our political and social body a vast multitude of citizens whose ways are not the ways of the founding fathers and whose thoughts are not their thoughts. We are no longer an Anglo-Saxon people, as we once boasted ourselves to be. But our government and the spirit of our laws are the English common law. This form of government, and this spirit of our law, have proceeded from a peculiar people—the English—and from peculiar historical events. Our government and the spirit of our laws are English. They are national or racial; but we have called them universal as the ancient Hebrews called their tribal Jehovah the Universal God. Can we expect other peoples to venerate the English Ark of the Covenant as the English, and we, the political heirs of England, do? Can they rise at the English and American slogans as we ourselves rise? They have their own shibboleths and anathemas—their own Magna Chartas, their own blood-bought bill of rights. What to them is trial by jury, due process of law, freedom of religion, of the press or of speech, habeas corpus, and such like cornerstones of our liberty? How can they be expected to appreciate the historical necessity for all the legal intricacies of our system of government and judicial procedure? Will they not think in terms of the feudal, the ecclesiastical, or the military form of governmental administration to which they and their sires, have
given allegiance time out of mind? What wonder if they find some of our governmental bulwarks mere technicalities and trifles, to be ignored whenever possible. What surprise if they approach our national problems in the light of their racial history, and undertake to solve these problems upon the principles which were accepted in their native lands centuries before America was ever heard of?

It thus comes about that the lawyers’ approach to national problems and the lawyers’ method of administering our government is questioned by a very large, respectable and influential part of our people. Millions of our nation no longer cry out unto the lawyer when they wish to be saved. “With their hymn books and their psalters, they appeal to other altars.” They are beginning to lift up not lawyers, but others to rule over them, and the lawyers’ primacy is probably passing away forever.

Anent this transformation and change of leaders, certain observations suggest themselves.

In the first place, the change is not merely threatening or impending. It has happened; it is an accomplished fact. A new group are in the ascendency in the nation—not merely a new political party, but a new stratum of our citizens. The lawyer is no longer the prime factor in governmental affairs. Government by law is tending to give way to direct personal government.

In the second place, the change will never be reversed. This is not simply because it is to be expected that the present political control of our government is unshakable, but because no social, economic or political movement as profound as that which has upheaved this country—and the world, for that matter—can ever be undone. You cannot undo an earthquake, or reverse the course of the tides. Our only wise course is to adjust ourselves as best we can.

In the third place, the lawyer, neither professionally nor politically, will ever be wholly eliminated for two reasons: first, of all professions in the world, the lawyer is the most flexible and agile. He is concerned professionally only with the law and the government as it is, not as it should be; secondly, the creation of new tribunals, supposed to make unnecessary the intervention of an advocate, has always attracted rather than repelled the lawyer. Swarming around every newly created quasi-tribunal, or bureau in lieu of a court, are assistants supposed to know the statutes, rules and methods by which such functionaries act. These assistants
rapidly become legal advisers, or lawyers, by whatever name they may be called. Every citizen who invokes the law or a tribunal administering the law, will always need for a guide one expert in the law. Hence the omnipresence of the lawyer in our society, his alleged omniscience and his hitherto omnipotence.

In the fourth place this change is, at least in part, a good thing. It was not a happy situation that the lawyer was called upon to carry so great a part of the burden of government. It was fallacious to think that the lawyer's medicine, namely, the law and the courts, can cure all ills. The legal caste was no more fit to monopolize the government than the priestly caste or the military caste, or the landed caste or the merchant caste. If the displacement of the lawyer is to be followed by the substitution of some other single group such as the college instructor, or the labor leader, for instance, as another ruling group, the change cannot be an improvement; but if it means the bringing into government councils of a more diversified representation of the citizens, all will be well.

In the fifth place, we may learn much from the new racial groups which America is absorbing. It may be that our legalistic system of government is not beyond improvement, and that all wisdom did not die with the founding fathers; that older nations may have found long ago solutions to problems which are to us new and unsolvable; that as these newcomers have brought us much that is good in art and science, strictly so-called, they may have for us something worthy of consideration in government; that other wares beside the lawyer's stock-in-trade may be used to advantage in the ruling of the nation.

In the sixth place, may we not with propriety, when we receive the "Greeks bearing gifts," exercise some precaution? Many of these newcomers to America are from peoples who have never in their historical existence, been able to govern themselves. Should we permit them to govern us—to tell us how we should be governed? Others arrive here from a thousand years of the most grinding oppression, with a background of centuries of continual hatred of government. Can we, with propriety, allow such as these to assume immediate leadership here, or to be elevated, without a probationary period, to positions where love of government and loyalty to government, not hatred of government, are to be expected? Think on these things!

But I must conclude, lest I appear to assume unwarranted
wisdom. Therefore, hear the conclusion of the whole matter. The bar of America is about to be tried as by fire. On being cast aside, shall we merely sulk, like Achilles? Was our greatness merely the greatness of place? Can we be patriotic under neglect? Can we still produce statesmen while, in what the British call "opposition"? Shall we become merely carping, whimpering, envious of others? If so, the people have done well to choose others to lead them.

There are things needed to be done for this nation, which none can do except he be a lawyer. There are mighty fortresses of our liberty which none can defend save lawyers. There are basic principles of free government, which none can know but lawyers. There are mighty battles to be fought for our people; for which none has the sword but lawyers. There are altars to defend which none but lawyers can defend.

All that mankind has learned through ages about government, liberty, justice, has been crystallized in our constitutions and our laws. Of these things the bar is the last guard. If we fail, the soldier, the priest, the teacher, the economist, the industrialist—all shall fail. To your tents, O Israel!

Whether the causes thereof have been correctly discerned or not, the fact of the lawyers political subsidence cannot be disputed. We are being taken out of the game. Our substitutes are from what we have been accustomed to regard as the second, third or fourth team. We hope they can hold the line—can put the ball over. But if their inexperience makes them—and all of us—victims of the enemy—if their system of play proves to be unsuccessful—if they call the wrong plays—let them, the country and the world remember the system which was good for a hundred and fifty years and gave us a winning team for a century and a half. If our successors, whatever they are to be, shall be successful, we can still point to America’s fifteen decades of glory and grandeur, of stupendous growth and progress, of liberty and prosperity, of happiness and justice, incomparable and unapproachable in the annals of mankind, and challenge those who are about to lead in our stead to surpass that record if they can. And may the God of Nations vouchsafe unto us that the next century and a half may be equal to that which has just passed away.