

# Government Counsel and Their Opportunity\*

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**A**LMOST exactly six years ago I arrived in Washington to become General Counsel for the Bureau of Internal Revenue. Promising myself and my clients that it was for a year only, a good deal bewildered at the size and complexity of the government machine, I joined the ranks of government counsel.

The Federal Bar Association promptly extended a hospitable hand. In it I found men and women who entered the Government service under many different administrations, who are divided in political affiliations, in social viewpoint, in race and in creed. They are, however, in two things united—in devotion to the Federal legal service and in maintaining for that service the best ideals and traditions of our profession.

That spirit has been increased by the leadership of your distinguished toastmaster, with whom I worked in the field of legal organization long before I thought of entering government service.

Your invitation to speak tonight was extended to the Solicitor General of the United States and, as such, I accepted it. Lawyers know that office as one of the few in government where one's energies may be devoted to the philosophy of the law, and to court room advocacy, without having his mind constantly littered with administrative detail. Of course, the title gives the public some difficulty in understanding the function of that office. A high school girl in Kansas recently wrote to me that her class was making a study of the Department of Justice, and she asked me to send her "all available free material on soliciting in the Department of Justice." Any humiliation from this incident was overcome a short time later when a niece of one of your members wrote home about her visit to Washington and referred to me as "the Celestial General." From such a pinnacle, a mere Attorney Generalship would be a demotion. I congratulate government counsel throughout the service that Francis Biddle, a lawyer known to many of them, and familiar with the problems of government, has been willing to leave a lifetime Judgeship to become Solicitor General. That reveals the esteem in which he holds that office—an office which involves the greatest professional opportunity and intellectual satisfaction of any in all the Government.

I accepted your invitation gladly, not merely because the invitation is in itself a compliment, but also because I was told that we would unite in honoring, as the guest of the evening, Mr. Justice Stone. Those who seek to combine high professional standards with public service could find no more inspiring example of each than in our guest tonight.

Harlan Stone would have become a great lawyer even if every law book in the world had been burned the day he was born. Underlying his scholarship is a fine native sense of ordered relations among men, of proper balance between property rights and personal rights, and of what is just and square in a work-a-day

world. He is understanding toward the mistakes and weaknesses of his fellowmen, and is impatient only of evil purpose or of bad workmanship. He shares wholeheartedly the democratic aspirations that have produced our great American experiment in government by the consent of the governed, and his service on the Supreme Court will be remembered for its statesmanlike as well as for its lawyerlike contributions to our constitutional development.

When I undertook to speak tonight, not being gifted with the foresight of a columnist, I did not know that I was to become his remote successor in the Attorney General which he filled with such distinction.

It is not too much to say that he took it over at a time when the country felt actually unsafe because of the misuse that had been made of its powers. Happily no successor of his has ever had a problem comparable to that which faced Harlan Stone. He cleaned house and accomplished a quiet regeneration of the Department of Justice. He reorganized the Federal Bureau of Investigation, put it on a professional basis, and properly confined its activities to investigation of violations of federal law. He brought into the service of the government clean, energetic, and non-political lawyers, many of whom are with us still. Moreover, it is interesting to note that in some respects he anticipated the New Deal. For he recommended in 1925 four Crime laws which did not become law until, in 1934, they were enacted by the 73d Congress, as a part of the Crime Control program of this administration.

The rank and file of the Department cherish affectionately the tradition of an informal, democratic, easily accessible, kindly, and understanding Attorney General. He went into court frequently and personally took the heat of the opposition, because he had a deep devotion to court room work and to the development of the philosophy of the law which is the underlying function of advocacy. It is good for one's humility to engage in this personal advocacy. Every advocate knows within himself how inadequate is his performance compared to his opportunity—for he knows that his actual argument is never the stirring thing he planned, nor is it ever equal to the one he thinks of the night after. Attorney General Stone inspired his staff by example and by generous credit to those fellow workers on whom the record of every executive must so largely depend. It has been said that he regarded none of his lawyers as subordinate, but all as associates.

In this weird city, where so many are making speeches and so few listen to them, you may have overlooked a great speech by Mr. Justice Stone, which, both as a tribute to our guest and as an inspiration to our bar, should be republished in your excellent Journal [*the Federal Bar Journal*].

He welcomes searching criticism of our cherished professional ideals and traditions, including that of our leadership in public affairs, because to no other group in this country has the state granted comparable privileges or permitted so much autonomy. As

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victims of changes in economic and social life of whose nature and effect we are still not wholly aware, he says our need is not merely to focus our attention on petty misconduct in the disreputable outer fringes of the profession. Instead he goes to the root of the matter and shows that most of the mistakes and major faults of our time are to be ascribed to a failure to observe the fiduciary principle, old in equity and recognized by law—the principle of trusteeship, without which our kind of society cannot permanently endure. The lawyer in America, as he points out, has reached his highest position in public esteem in dealing with public questions which have become identified with forms of legal right, such as the historic controversies, out of which grew our Bill of Rights. He demands with earnest eloquence a fresh and active devotion on the part of men who wield power to the principles that govern trusteeship.

Justice Stone has thus summoned the bar to an old and exacting standard, but one entirely practical and attainable for government counsel. Every lawyer, true to his profession, dwells constantly in a climate of confidence and of trusteeship, and in the daily admonition of law and of tradition that he must serve no end that conflicts with his trust. I have never hesitated to be a critic of my profession. Its performance of its social obligation is sometimes pretty bad. But it remains true that no group can show a record of higher average fidelity to its trust. Indeed it is probable that both the private and the government bar more often err on the side of overzeal than on the side of betrayal of trust.

We lawyers, who sit temporarily in the position of government counsel, are subject to admonitions to duty in office that those outside of the profession never knew to exist. To every one of us, our standing among our professional fellows, our name among lawyers who are our most severe, yet most fair, judges, is a fixed asset compared to the volatile values of politics. And a lawyer's standard includes not only zeal to protect the interests of government, but also respect for the legitimate rights of adversaries. One of my able predecessors in the Solicitor Generalship reminded us that government does not lose any case if, by its result, justice is done. Mere statistics of success form no criterion by which to judge government counsel. Fundamental things in our American way of life depend on the intellectual integrity, courage and straight thinking of our government lawyers. Rights, privileges and immunities of our citizens have only that life which is given them by those who sit in positions of authority.

In all of our doings there is of course a great difference between the mere belligerency and bluster that

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the plaintiff was a citizen of another State of the Union. Perhaps the reason for presenting the foreign citizenship issue (if there was any special reason for doing so) will appear at the same point where reference is found to the apparent inconsistency of the State's positions in the two cases. The Constitution seems to place "citizens of another State" and "citizens or subjects" of "foreign States" on exactly the same basis in respect to cases "between a State" and themselves. It says:

"The judicial power shall extend . . . to controversies . . . between a State and citizens of another State; . . . and between a State . . . and foreign States, citizens or subjects."

used to be the court room manner of the lawyer and the dispassionate pursuit of justice which our modern manner calls for. But government counsel is not required to be dull in order to be temperate, nor is he required, in devotion to the ideals of his profession, to be so afraid of public movements and the intellectual or political currents of his time that he fears to indorse anything—except his pay check. We are citizens as well as lawyers.

Woodrow Wilson would deserve immortality had his only public service been to speak these lines:

". . . Every man who takes office in Washington either grows or swells. . . . The mischief of it is that when they swell they do not swell enough to burst . . . But the men who grow, the men who think better a year after they are put in office than they thought when they were put in office, are the balance wheels of the whole thing."

No place in our profession offers greater opportunity and urge to grow than the legal service of the government. In any of the departments, in the special agencies, in the Department of Justice the daily tasks we done will soon make one a person of special authority in his line. The volume of experience, the intensity of it, the sheer pressure to explore special problems can hardly fail to make faithful government counsel, however humble his beginnings, outstanding among the competent men of his time.

A large, and able, and respected private bar is engaged in the work of moulding the law slowly but steadily in the private interest. In its pleadings and strategy it puts strong pressure upon courts and administrators to develop the science of law in the direction of extension of private rights. The response to that pressure must be exerted by us. We must guide the processes of our courts in the direction of the public interest if we are to avoid a one-sided evolution of the law.

We lawyers must at times risk ourselves and our records to defend our legal processes from discredit and to maintain a dispassionate, disinterested, and impartial enforcement of the law. In spite of any temporary passion or hysteria, I have an abiding faith in the fairness and discernment of the sober second thought of the American people. We must have the courage to face any temporary criticism until this judgment arrives. The prestige of the law and the moral authority of our legal process rests upon their disinterestedness and impersonality. These ideals we, as Americans, hold most dear are much a trial in the hands of government counsel. We will keep the faith.

"In all cases . . . in which a State shall be party, the supreme court shall have original jurisdiction." United States Constitution, Article III, Section 2, parts clauses 1 and 2.

To those for whom the historical learning of the youth may have been dimmed by the later onrush of other important events, it is recalled that the Supreme Court's decision in the *Chisholm case*—permitting a suit by a citizen of one State against another State—what provoked adoption of the eleventh Amendment effective January 8, 1798, providing that

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."