FOR RELEASE
NOVEMBER 28, 2007
7:00 P.M.

NEW YORK CITY BAR ASSOCIATION
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CARDOZO LECTURE

THE ROLE OF JUDGES IN A GOVERNMENT OF, BY, AND FOR THE PEOPLE

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I am deeply grateful for Senator Kennedy's words. They are much more generous than I deserve. It is a matter of great regret that he could not be here tonight. For almost half a century he has fought a continuing battle for the oppressed and for the future of our great nation—as did his brothers.

Delivering this lecture is, for me, an extraordinary honor. It was this Association's superb library that supplied the resources I needed as Judge Stanley Fuld's clerk in the 1940s, and later as a private practitioner with a tiny office on 42nd Street.

Here, in the early 1950's, I had the privilege of working on committees with Harry Tweed, Jack Dykman, Judge Sylvia Jaffin Liese and other generous lawyers. They persuaded youngsters like me, through example, that with good luck we too might ultimately practice law in their great tradition—to improve society.

Entering this building in the forties and fifties, when we were still heady from having defeated the world's tyrants, the fluted pillars seemed to whisper, "liberty, equality and justice for all."

Introduction

My topic is the role of a judge in a government "of, by, and, for the people" - - as Lincoln

described it in his Gettysburg address.

Our goal is equal justice for all. Our course is set by Lincoln's glowing verbal constellation.

But, as I shall explain, our magnificent legal vessel is losing its way.

Lincoln's Words

The Cardozo lecture that particularly resonates with Lincoln's words was Chief Justice Earl Warren's in 1970, titled "All Men Are Created Equal." He began by expressing his concern about whether we are headed toward the great American ideal expressed in our Declaration of Independence that "All men are created equal, and . . . endowed . . . with inalienable rights."

And he concluded, as Lincoln might have, "It is not enough merely to open the courthouse doors to everyone. The proceedings . . . must . . . be open on equal terms to all who enter; otherwise the word 'justice' is a sterile one which cannot command the respect we claim for it."

Lincoln's use of the phrase "Government of the people, by the people, for the people," was iconic. As a lawyer, he summarized and integrated our founding documents, the Declaration of Independence and the Constitution. He defined our ideals. He plotted the future course of our law.

As a poet and a prophet his words shone with light and hope. They are delphic, tantalizingly vague, with meaning sometimes obscured, much like the chameleon phrases "due process," "cruel and unusual punishment" and "rule of law" that continue to inspire, intrigue and puzzle us - - but do reflect our judicial aspirations.

As I suggest to my new clerks each year: "We are here to serve litigants, lawyers and the public. Persons before us in any matter - - criminal or civil - - must be treated with respect. Their dignity must be preserved. Our allegiance is to the people and preservation of their government and their control of it for their benefit."

Cardozo would, I think, have approved. He was pragmatic, conforming the law where possible to what he saw as the people's needs. In Judge Posner's phrase, "Cardozo's project [was] making the law serve human rather than mandarin needs." "[H]is judicial program [was] bringing law closer to the . . . non-lawyer's sense of justice."

Facts, Law and Empathy

Cardozo's meticulous analysis was of fact and law. Lincoln stressed a third element of justice - - empathy, the feelings we have for the welfare of our fellow men and women.

Determination of the facts requires a sense of how people act and think in the real world. Because of a judge's circumscribed life experiences and affluent friends, his or her ability to draw appropriate inferences from the evidence is more limited than that of the jury - - a cross section of the community. Following the constitutional requirement of jury trials not only is a sensible route to fact-finding, it provides litigants with a judgment by their impartial peers. Yet, as I shall demonstrate, the right to a jury, implicated in Lincoln's "by the people," is being sharply eroded.

Law is the favored domain of the judges, but haze often obscures the terrain. Protection of rights has generally improved in the more than sixty years that I have been studying law. But, today, in Congress, state legislatures and the Supreme Court, there is a tendency to close the doors to the courts, to forget that they are designed to be used "for the people."

Lincoln's empathy is physically revealed by a large copy of his last known photograph, taken a few days before his death. It hangs in our Eastern District judge's conference room. He is haggard, with sad eyes in deep sockets, reflecting his connection to all humanity and its travails. His visage is a continuing reminder to each of our judges of our bond to those who look to us for understanding. They depend upon our empathy as well as our sagacity.

Empathy is generated in large part by experiences in court as well as outside of it.

In one of the courtrooms in the Eastern District you could hear revealed: developmentally disabled children in a state institution sitting on the floor half-naked in their own waste; Black students placed in segregated grade schools, and pushed out of high schools because their teachers thought them too difficult to deal with; decent people torn from loving families and their community for long destructive prison terms; young schizophrenics wrongly denied social security because the government had decided, on trumped up evidence, that they could work; mothers, beaten by their men and then deprived by the state of their children, just because they had been beaten; desperate young women rendered barren because their mothers had taken a prescribed drug while they were pregnant; and many other reflections of life's cruelties.

In a nearby Family Court you would see what a Family Court judge described less than a fortnight ago as a "mounting child welfare crisis." Judges with a "crushing caseload" are adjourning for months cases requiring immediate protection of at-risk impoverished children.

Most distressing of all, our judges observe what Marian Wright Edelman refers to as "the feeder systems into the Cradle to Prison Pipeline"—the dysfunctional family, segregated housing, inadequate foster care, poor schools, lack of jobs, drug dependencies, mental problems, cruel imprisonment, and early death.

Knowledge acquired outside of court also necessarily affects the judge's views. Mine were shaped by depression and by war.

Based on those experiences in and out of court, I - - and other judges - - recognize and accept, the duty to help the disadvantaged where the law, reasonably construed, allows such support. It *is* appropriate for a judge to ask, "Does my decision unnecessarily widen the gap between rich and poor, advantaged and disadvantaged?"

Now to the words.

People

Lincoln used the word "*people*" inclusively. None were to be excluded from a legal definition that includes all in the universe of human beings in this country. This comprehensive view was established in principle by the Declaration of Independence. "All men are created equal."

In some respects the legal boundaries of peoplehood still remain unsettled, as in the case of undocumented immigrants.

Our Constitution mandates that no person shall be deprived of "life, liberty, or property, without due process of law;" "nor shall any State" "deny to any Person within its jurisdiction the equal protection of the laws."

It is significant that "persons," not "citizens" alone, are the beneficiaries of these protections. The "Due Process Clause applies to all 'persons' within the United States, including non-citizens, whether their presence here is lawful, unlawful, temporary, or permanent."

Equal protection implies that while non-citizens are in the country for more than a tourist's stay, they and their children should receive the same schooling, health care, and other

protections as a citizen would get. When disasters strike, non-citizens should obtain the same aid as citizens.

Current local tendencies to harass the undocumented are wrong. They are especially objectionable given our historic struggle against invidious discrimination and racism.

The national government has a large degree of freedom to deport immigrants and to deny them admission. But being cruel to them while they are here is not defensible under Lincoln's view of "people".

"Of" Requires the People's Control

Lincoln's "of" refers to sovereignty. In place of a king, the people now rule. Recall the preamble to the Constitution: "*We* the People of the United States, do ordain and establish this CONSTITUTION. . . ."

A judge must remember whose government this is. It is the people's. Since the courts are the people's, it follows that restrictions on their access to the courthouse should be disfavored.

The recently invented or expanded doctrines of standing, political question, abstention, preemption, and government privileges and immunities are being increasingly utilized to limit the people's power to question the actions of their officials - - or even to know what they are doing. These developments are contrary to the spirit of a government and courts "of the people."

Counsel

Many lack the means to protect their rights in court because they have no attorney. Our goals should be: first, a lawyer for everyone who needs one, whether as a defendant in a criminal case or a party in a civil case; and, second, one well-trained for the particular type of work

involved, for example, welfare, discrimination, elder rights, domestic violence, immigration, family law, or other specialty.

Experience in the disposition of many hundreds of habeas corpus, criminal, and civil cases based on civil rights violations and discrimination has left me with a disquieting feeling that many who desperately need a good lawyer's help fall between the cracks of a jerry-built, non-system.

Fees for appointed counsel in criminal and family courts are too low to attract enough good lawyers. On the civil side, "a mere one-fifth of the civil legal service needs of low income New Yorkers are being met."

Effective counsel in state and federal collateral attacks on convictions is particularly important because of numerous recently enacted procedural barriers to obtaining the Writ of Habeas Corpus. Attorneys are often not available.

Sixty-five percent of those whose cases were completed in immigration courts during 2005 were unrepresented. The complexity of immigration law cries out for an attorney.

New York State, which justly prides itself on its extraordinary bar and law schools, needs to deal with this congeries of representation issues.

A joint state-federal task force on legal representation of the poor and middle class should be established <u>now</u>.

<u>Standing</u>

Though standing is a relatively recent tool designed to keep people from challenging governmental activity, it is growing in power. The most recent troubling example is *Hein, Director, White House Office of Faith-Based Initiatives Inc.*—a 2007 five to four decision. By

executive order, the President created government offices to help religious-based groups obtain federal financial support.

Respondents alleged that the offices violated the Constitution's Establishment Clause.

The Supreme Court approved dismissal of this case on standing grounds, thus sealing an entry-way to vindication of Constitutional rights.

Political Question

The political question excuse should not result—as it has—in dismissal of cases which implicate the rights of individuals. In a suit brought by Vietnamese nationals against manufacturers of Agent Orange for harms allegedly done to them by the United States' use of herbicides during the Vietnam War, the government argued that the case presented a nonjusticiable political question because it implicated foreign relations and required the evaluation of the President's conduct during wartime. That argument was rejected: "The question . . . is whether American corporations acted in violation of international law during a war. . . . This kind of determination is one of substantive . . . law, not policy. A categorical rule of non-justiciability because of possible interference with executive power, even in times of war, "does not exist."

Abstention

Abstention, like the judge-made doctrines, of standing and political question, allows the courts to keep litigants out. It is a largely unwarranted exception to a federal court's duty to exercise its jurisdiction over the claims of individuals.

In *Nicholson*, a case involving a City Child Protective Services policy to remove children from mothers who were being physically abused by their male partners, the district court refused

to abstain on state-policy grounds. Its preliminary injunction prevented unnecessary removal of children from their mothers. The Court of Appeals for the Second Circuit certified critical questions to the New York Court of Appeals. And, while the case was wending its way through the federal and state appellate processes, the protective stay remained in effect. Ultimately the parties settled. Emergency removals of children due to domestic violence against their mother are now closely scrutinized.

Statutes of Limitations

Construing statutes of limitations so that potential plaintiffs do not have a realistic opportunity to find out that they have been injured, and by whom, is another way to close the courts to people with bona fide grievances. Such a case was this year's *Ledbetter*. The plaintiff, a woman allegedly discriminated against by giving more to men than to her for equal work, was denied a remedy because she filed her EEOC complaint more than 180 days after her first discriminatory paycheck.

The *Ledbetter* majority ignored the reality of employment. It would require a new employee to come in with a chip on her shoulder, trying to find out what others were being paid and then bringing an EEOC complaint within 180 days of her hiring.

Government Privileges

Government privileges introduce a non-Lincolnian barrier between the people and their government. As Justice Brennan observed, there is an inherent paradox in the government's rationale: "so as to enable the government more effectively to implement the will of the people, the people are kept in ignorance of the workings of their government."

Illustrative of overreaching is the state secrets privilege, recognized by the Supreme

Court in 1953 in *Reynolds*. An Air Force plane testing secret electronic equipment crashed and killed on-board civilians. When the widows sought production of an accident report, the Air Force Secretary refused to turn it over on the ground that revelation would hamper national security, and he was upheld.

In 2000, a half-century after the crash, when the Air Force report was finally declassified, we learned that it contained no state secrets relating to national security. Instead, the report showed that the crash was caused by negligence. Exercise of the privilege was based on an executive impulse to conceal mistakes and to deny relief to the those who had been wronged.

Government Immunity

Justice John Marshall recognized in *Marbury* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Immunity "places the government above the law and . . . ensures that some individuals who have suffered egregious harms will be unable to receive redress for their injuries."

Yet, in the last few years the Supreme Court has expanded Eleventh Amendment immunity as a restriction on the subject matter jurisdiction of the federal courts, barring almost all suits against state governments for violations of federal rights.

Procedural Rules

And tightened procedural rules now make it harder for a plaintiff to enter the courts.

Pleading

This last term the Supreme Court suddenly increased pleading burdens in the *Twombly* case. The case "marks a clear and visible departure from . . . liberal federal pleading

standards."

Summary Judgment

Expanded summary judgment raises another barrier to the courts. Professor Margaret Berger has demonstrated that the *Daubert* line of decisions, while designed to provide a threshold of reliability for expert testimony, is increasingly being used by trial and appellate judges to exclude helpful scientific evidence and then, because there is insufficient proof, to dismiss claims that should be decided by juries.

The scope of summary judgment was the central issue in *Scott*, a 2007 case. During a car chase a police officer had forced the plaintiff off the road causing paraplegia. He sued the officer. The federal district court and the court of appeals rejected motions for summary judgment and for dismissal based upon qualified immunity. Both courts held that the question of whether the plaintiff's actions had risen to a level warranting deadly force was reserved for a jury.

The Supreme Court relied upon its own in chambers viewing of a video recording of the chase taken from a police car. It held that the officer had acted reasonably. This was an almost unprecedented diminution of the constitutional fact-finding power of the jury.

The dissent reviewed the evidence from the viewpoint of a reasonable juror who would have known the local roads and driving patterns and who would have applied a local driver's experience. It plausibly concluded that many reasonable jurors might view the officer's conduct as actionable.

By" Requires Participation by the People Whenever Practicable

Lincoln assumed that the government would to be run "by" the people, as much as that is

possible in a large democratic republic. Control was provided through participation in the jury; voting; and exercise of the right to find out what is going on, to speak freely, to assemble and to petition the legislature and courts for redress.

Juries

Service as jurors is the way most lay people participate in government in a direct way. It ensures that the legal system is grounded in factual reality.

In many district courts panels of jurors are selected from voting and motor vehicle registration lists. That process excludes the poor who lack cars and do not vote. Broadening is needed, as by using public benefit lists. We also tend to excuse jurors who depend upon their daily work for income, for instance taxi drivers who cannot afford to give up a day's work. Required are higher jury pay, as well as legislation mandating that employers of substantial numbers of people pay jurors what they will lose while they are on jury service.

Death Qualification

Dismissals for cause based on jurors' beliefs still result in jury panels biased towards the government in death penalty cases. The Supreme Court just ruled in *Utrecht*, that a trial judge did not abuse discretion by dismissing a juror for cause who was reluctant to impose the death penalty even though the juror swore that he would follow the law as instructed by the judge. Such a potential juror should not be disqualified for cause.

Voting

Our efforts to fully democratize voting still falls far short of the Lincoln goal. What was characterized in an opinion ten years ago as a "vast surging tide towards full voting rights," is ebbing.

Money of the rich and powerful still has a disproportionate effect on elections. Legislative efforts to control contributions has been frustrated by the courts.

The United States Department of Justice granted pre-clearance to Georgia's burdensome identification requirements. A federal court struck them down as a kind of poll tax on the poor.

The United States Commission on Civil Rights is no longer bipartisan. It has lost the confidence of many that it can be depended upon to protect minority voting rights.

Gerrymandering

Partisan gerrymandering remains a substantial obstacle to equal voting power, but the Court allows it to go on. Experience with redistricting indicates that drawing satisfactory lines is never easy, but that does not excuse court silence in the face of rampant abuse.

"For" Requires Redress, Particularly for the Disadvantaged

Power was to be exercised "for" the people. That is to say, the government was to help all the people—to provide real legal equality—to the extent possible. Lincoln's July 4, 1861 "Message to Congress in Special Session," contrasted the difference between the Confederacy's goals and that of the Union. The President declared:

> This is essentially a People's contest. On the side of the Union, it is a struggle . . . of government whose leading object is to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life.

Education

Has that happened in education? No.

Education is a prerequisite for a "fair chance, in the race of life." An educated population is required for participation "by" people in government.

Much of our court's desegregation work and that of states and localities will have to stop because of the Supreme Court's 2007 majority opinion in *Seattle* and *Jefferson County*. The majority struck down student assignment plans that relied in part upon racial classification to allocate slots in schools that were oversubscribed because they were believed by students and parents to provide a better education than schools in ghetto areas. The Court ruled that any classification on the basis of race was improper. It refused to recognize that these local school boards were using racial classifications *to help*, *rather than*, as in pre-*Brown*, to *denigrate* Blacks.

Justice Breyer's warning at the end of his dissent in the *Seattle* school case might have been uttered by Lincoln. He declared:

> [T]he very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they face . . . . [T]hey have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments. . . they believe are needed to overcome the problems of cities divided by race and poverty . . . .This is a decision . . . the Court and the Nation will come to regret.

Ideas and grand plans are not enough. Increased funding at the national and state levels is required.

Nevertheless, the power of courts to compel financing to obtain constitutional equality was circumscribed by the Supreme Court majority in *San Antonio*. It held that there was no federal constitutional right to state monetary help to equalize educational opportunities. This

was a serious blow to a decent education for all. Local real estate taxes from poor communities cannot carry the load.

> Recall Lincoln's haunting Second Inaugural reminder that burdens from slavery may be required to be borne "until all the wealth piled by the bonds-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn by with the lash shall be paid."

And, what about torts, in which Cardozo had a particular interest?

Torts

An adequate tort law remains crucial to providing "for" the people. Tort law is our primary fall-back method of empowering ordinary people to remedy injustices to themselves through their courts.

So called "tort reforms" that reduce compensation disproportionately and place excessive barriers on recovery through complex procedures, breech the constitutional right to individual compensation for tortious conduct.

Class or aggregated actions are required to equalize that litigation power. Yet, as Professor John Coffee properly warns us, because of recent decisions the "long term future of the class action is in doubt."

Sentencing

Finally, there is sentencing.

Lincoln faced terrible life and death decisions in reviewing courts martials—many resulting in death sentences. We have too often ignored his compassionate approach.

The combination of mandatory minimum penalties, rigid guidelines, elimination of

parole, and reduced use of probation or other non-prison sanctions has resulted in the United States punishing criminals much more severely than any other Western nation. The result: unnecessary cost to offenders, families, minority communities, and taxpayers. The *Booker* line of cases now permits federal judges to impose more realistic sentences. Still, in some circuits there is a presumption against departing from harsh guidelines. Everywhere brutal minimum sentences must be imposed.

Conclusion

So, in conclusion, where does all this leave us? We judges cling to the tiller—respect for the law and our colleagues on the bench, in the bar and at the academies. We struggle to keep on course in the buffeting narrow sea between the hard rock of unfeeling abstraction and the treacherous whirlpool of unrestrained empathy and compassion. We steer with eyes on Lincoln's shining stars - - "of," "for," and "by the people."

As for me, I've been savoring every moment because of the kindness and forbearance of family, teachers, colleagues, lawyers, students, law clerks and friends.

Thank you all.