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## A Layman's View of the Lawyers

John Foster

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will be willing to take judicial office when they feel they will not be subjected to the expense and disagreeableness of a state-wide campaign or a political campaign, especially in the larger counties. It is believed that there is some distinction between the executive and legislative, who are elected to carry out the will of the people, and the judiciary who should have, it is believed, a greater independence and who are not elected to carry out the will of the people, but whose job is to decide cases according to the facts and according to the law regardless of the will of the majority. So it is believed, that while this is not a perfect plan, it does furnish a method for obtaining better judges and a method of retaining in office better judges, while at the same time being reasonably democratic and eliminating the unfit, and therefore, we submit, a definite improvement.

**“A Layman’s View of the Lawyers,” by John Foster,  
Editor, Rocky Mountain News, Denver, Colo.**

This is the fourth time in the past year I have had the privilege of appearing before a group such as yours, and frankly, I like it. I cannot, of course, predict how you will feel a half hour hence. But, as for myself, I think it is all to the good that a member of my profession exchange views with the members of a profession whose human and political activities have such a bearing on news.

Whether they like it or not, the newspaper and legal professions are part of the same world. Sometimes they’re partners, sometimes they’re in dog-and-cat conflict, but always they’re participants in the human scene as it unfolds.

Why it should have fallen on me so often to explore this relationship I do not know. Like most newspapermen I prefer the detached security of the typewriter to a position as vulnerable as this one. But a year ago Judge Orin L. Phillips, of the Tenth Circuit Court of Appeals, asked me to say a few words before those graven jurists in Santa Fe, New Mexico. I like Santa Fe. It is a world that time has forgotten and haste never knew. I like federal judges also—but, of course, for entirely different reasons.

And so I spoke before this judicial conference, pleading for a closer, more warmly human relationship between the law and the citizen, pleading for simpler judicial procedure that would make the meaning of law more clearly apparent to the citizen, pleading for an understand-

ing between the lawyer and the court on the one hand and the man at the bar and the man in the jury box on the other.

Since that time many of these laymen-legal conferences have been held. Scores of other newspapermen have addressed similar conclaves. It is all a part of the tide of effort apparent everywhere to make the law a living part of daily American life. And I am, as I said, glad to be among your profession again. I am glad, in part, because I am by nature an optimist. I like to be among optimists—and to me the lawyer is, in every professional way, the most optimistic individual in the world. The high hope of potential victory is always with him. He is like the old prospectors we have back home in our Colorado hills who are eternally sure that the next stick of dynamite will open up the mother lode.

I have talked with hundreds of lawyers about their cases and I have never known a single one of them who wasn't boyishly certain that he would—or at least—might win. I have never known one out of a thousand who wasn't morally certain of his client's blameless existence.

I like people who feel that way I like people who can get excited about the role they play in life. In a world grown gray with worry and fear and brooding puzzlements I like to be among professional people who, with the eternal basis of pure law as their philosophy, can actually find hope of things working out right.

At the same time I am glad to be here because it is by invitation—not subpoena. Thank God this is a group of private people discussing public questions—and not a congressional investigation. I cannot help inserting at this point an expression of the growing contempt I have for congressional investigations because I think you as lawyers should feel the same way and want to do something about it.

When you have a Senator Walsh exploring the ugly depths of Teapot Dome that is one thing. But when you have a Senator Brewster trying to stir up political conflict by scandalous innuendo—then the function of legislative inquiry is held up to ridicule.

The Hughes investigation began with a proper inquiry as to whether several million dollars had been wasted in a war experiment. It ended up with unrelated tales of parties at the Stork Club, what girl was bored by what general, who paid for whose honeymoon night—girls, girls—and Senator Brewster high-hedging it for the Maine woods.

It made the Republican party look ridiculous. Vandenberg in calling it off acknowledged that. But worst of all it brought into disrepute the

vital and fundamental function of congressional inquiry. The legislative branch must retain this power, for it is an integral part of our form of government. It should be respected by the public.

But what has happened to the congressional investigation system? You know well enough. It has become a black-jack affair. Blanket telegraph subpoenas. Cloak and dagger boys trying to nab and force you to go to Washington. Rough stuff. Blows below the belt. Where were you on the night of so-and-so? Have you stopped beating your wife? The sit down and shut up approach. Bully-ragging of witnesses. All done with less protection for a witness than a victim when Henry VIII slapped on a bill of attainder.

What these congressional investigations must have—if they are to become anything except crenel side shows—is the establishment of rules of evidence, a system of procedure that will produce material truth, not blackmail. And it is the members of your profession, ladies and gentlemen of the Bar, who are best equipped to bring about this reform. I can think of no national assignment more important than this.

It is, I think, part of your function as lawyers to take it on. Now just what is the true function of a lawyer? As I gathered notes for this conversation today I asked myself that question over and over again. What is his role in a confused and tremulous world? How best can he fulfill the oath he took when, in youthful eagerness, he was admitted to the Bar?

I had been reading a legal biography of Cicero by the distinguished jurist from northern Ohio—Judge Robert N. Wilkin. In the preface to this excellent book he tried to define the character of the lawyer. It is a long definition. But I should like to read it anyway. For if I were a lawyer I know I should want to try to see myself in relationship to these ideals.

Judge Wilkin wrote:

"The lawyer in any period occupies a peculiar position in human affairs, and from that position stem certain common experiences. The lawyer stands on middle ground. His sphere is swept by all currents of life, especially its cross-currents. He is brought into contact with all people. He is a private go-between, the public intermediary, the international diplomat.

"The boundaries of his influence overlap the boundaries of all classes, all trades and all professions. He is a doctor and a priest, yet he is necessarily more of a philosopher than a doctor of medicine and more of a scientist than the priest of religion. In analyzing human emotions he is a psychologist; in playing upon

human emotions he is an artist; in marshalling of facts to the support of his thesis he is a logician.

"In business he is a statesman; in statecraft he is a business man; in politics he is a humanist. In all things he is a moralist. But in adjusting his principles to the arts of his profession he is a consummate sophist. He is a philosopher gone to market; a poet gone to courts; a mental warrior fighting for peace."

That is a great and poetic definition. And it would be well if the average citizen felt that the lawyer, as he understands him, fills that high and stirring role. But I'm afraid he doesn't. The average citizen, it seems to me, is suspicious of the lawyer. He is afraid and in some cases cynically skeptical of him. In the last few days I have asked a score of people, from many walks of life, just what they think of the ladies and gentlemen of your profession—and I have received a wide and interesting variety of answers.

Some of them felt that lawyers were interested only in getting what money they could from guilty clients.

Others were certain that all lawyers were potentially crooked and could be had for a price.

Others insisted that the lawyer had established himself on the side of wealth, and before the bar the poor man didn't have a chance.

Others declared that a lawyer was concerned only with winning a case, and had no concern whatever with the guilt or innocence of his client.

Others, with bitterness, said that in their opinion a lawyer had learned the tricks of a dubious profession primarily to defeat the ends of justice.

And, finally, most of them were unanimous in believing that the lawyer was created largely for the chosen few and that only those on the inside had access to him.

This may be an extreme summary of the answers to my question. And yet I do not think it is too far away from the average viewpoint of a large number of citizens whose experience with the law is confined largely to the police and justice of peace courts. Such a distorted viewpoint comes, of course, from a complete misunderstanding of the lawyer's role and ignorance as to the potential services of a lawyer. But misunderstanding or ignorance though it may be, this viewpoint is here—and I am confident you ladies and gentlemen recognize that fact.

Fortunately the bar associations of many states—stimulated by the American Bar Association—are trying to do something to combat this widespread cynicism toward your profession. The Colorado Bar Asso-

ciation has sponsored a scientific survey to determine how many are received necessary legal services. This survey produced identical results with a similar survey made by the medical profession. It showed that the upper classes because of their means and the lower classes because of charity are receiving adequate legal aid, but that the great middle class—the most influential of the three classes—was receiving virtually no legal aid at all.

So a committee was named by the Colorado Bar Association to investigate the possibility of setting up a system whereby anyone could receive competent legal advice for a fixed sum. The best lawyers are being approached with the idea of setting aside certain hours of the week for this purpose. The public will be advised of this voluntary legal clinic—the fee will be advertised, so much per half hour, so much per hour—and the average citizen will be told that here is where he can turn without fear for informed assistance.

A system similar to this already has been tried in California and Chicago.

This is all to the good. Of course, any system of legal clinics would bring in a lot of crack-pots and litigious fools. But there are always crack-pots and fools to cope with in any social development—and the good to be gained in spreading an appreciation of law among the average persons is far greater, I think, than any momentary annoyance.

For the lawyer and the law must be brought down to the people if we are to have any hope of harmony on the difficult social road that we are trying to follow. We are living in an age wherein classes are vanishing. We are the children of a period in history in which the lowest economic groups are struggling relentlessly to reach the top, and we—the privileged ones—must lend what knowledge and experience we have to them in an effort to keep the fundamental fabric of our political life unchanged.

It is a phenomenon that is being observed by the exponents of every profession—by the doctor, the newspaper, the author, the dentist—and each of them within his limitations is seeking to recognize his social responsibilities. So it must be with the legal profession. Law—and a respect for the law—must be spread like the sunshine among the great, struggling, groping, average citizenry, if our society with its traditional goals is to survive.

For the law is the very basis of our way of life. Without law—and an understanding of and respect for law—there is no order, there is no life free of fear, there is no peace.

This above all else we know

But how can a respect for law best be instilled in the hearts of the people? How can a greater understanding of the basic functions of law most realistically be transmitted to those who are either ignorant or cynical?

There are, I think, several immediate ways in which the lawyer in concert with the judge can tend to approach these ends:

1. By speeding up and improving judicial procedures.
2. By improving especially the operation of traffic, police and justice of peace courts, those courts which touch the lives of the greatest number of citizens.
3. By improving the lawyer's performance in the courtroom, especially in the selection of juries.

Let us look at these various possibilities separately

First, it seems to me that the federal courts in recent years have taken great strides in the simplification of their procedures. I do not know what your experience has been in Washington. But when I made a speech recently before the Minnesota Bar I was glad to learn that the legislature had authorized the supreme court to establish methods of patterning their rules of civil procedure after the Federal Rules of Civil Procedure in all courts except the probate court.

I am confident this will strengthen their legal machinery. For I, you see, have great faith in such methods as the rules of discovery and summary judgment, common practice in federal courts in recent years, as means of speeding up the processes of law.

And the speedier justice can be, the greater respect for law on the part of the average citizen. Part of his skepticism comes from his belief that it will take forever to get anything done in the courts, the lawyer will eat up all the money—the case, like that of *Jarndyce v. Jarndyce*, will run on everlastingly—and in the end nothing will be accomplished. So whatever can be done to unbind the hands of justice from the tangled tendrils of red tape is an assignment, I would think, that would be very close to the hearts of you ladies and gentlemen.

Now, as for traffic, police and justice of peace courts, their reputation in many places is scandalous. I do not know what the condition of these lowest courts is in Washington—I understand they operate far

more efficiently and humanly than the average—but in most parts of the country the condition is pitiable.

These are the courts with which the largest number of people have experience.

These are the courts in which the great majority of people get their first—and perhaps their only—impression of the processes of law

Yet how are these courts operated? In most cases they are operated in such a speed-up, high-handed and impersonal manner that the average victim goes away, with bitterness and contempt. Here where he should learn reverence for law he learns only blasphemy. He is one of a great line of cattle who pass by the judge and receive the law's knife without ever truly understanding the why and wherefore—and human justice—of the verdict.

Fortunately this lamentable condition of many traffic and police courts is well known, and the American Bar Association has begun extensive studies to improve the procedure. One of the first results of these studies is a fine book, "Traffic Courts," by George Warren. The author reaches these general conclusions

That more judges must be employed in large cities so that justice can be meted out more humanly, more convincingly;

That these judges must be paid more money than the pitifully low scale that prevails in most places;

That the judge, within the limits of possibility, must give the man arrested a full opportunity to tell his story, so that he will not feel the cards have been stacked against him.

These conclusions are so obvious that, since the condition of your police and traffic courts—at least in Seattle—is far above the average, I am certain you ladies and gentlemen are lending your influence to keep them so. It is to your personal and selfish advantage to do so. For, remember, it is in these courts that the average citizen gets his first education in law—and, to a large extent, whatever his final attitude is toward you, the lawyer, comes from this experience.

Now, as for the justice of peace courts, they are, on the whole, as bad—or in most cases perhaps worse. Again, I understand that in Seattle at least the condition of justice of peace courts is on the whole good, but—and I suspect in your own rural districts—these courts in Colorado are manned for the most part by individuals with absolutely no knowledge of law and no experience whatever in the rules of evidence.

Here again you have the type of court that touches the average American—the type of court from which he draws his conclusions as to the worth of law—and I say that in Colorado if, after an individual has gone through the average justice of peace court, he has anything except loathing for judicial processes, it is a miracle.

The average justice of peace—at least in Colorado—simply is not equipped to do an intelligent job. How could he be? Just look at the record. a bookkeeper and bill collector is the justice of peace in one of our counties, a painter and decorator in another, an ex-barber and ex-farmer in another, a freight clerk in another, a combination furniture dealer and undertaker in another.

In one of our smallest counties—a county locked in by Slumgullion Pass on one side and the Gunnison River on another—the justice of peace is a village mechanic. He repairs cars and tries cases only during the summer season and moves to sunnier climes for eight months of the year.

What happens to law during those eight months only heaven knows. I suspect it is conveniently suspended.

But even this is not as bad as the situation that holds in one of our old mining communities. At one time this was one of the most prosperous, most boisterous, most populous places in Colorado. But gold ran out and the price of silver cracked, and now ghosts for the most part moan along its tumble-down ruins. But still the county commissioners received from the justice of peace there long reports, regarding cases tried and disposed of. In checking these records the commissioners found that the name of the law-breaker was always the same, the fine always the same—\$60.00, the legal limit—and that the fine generously had been suspended.

The county commissioners wanted to know about this.

“Well,” said the justice of peace, “you want a justice of peace down our way, don’t you? Well, not many people come down there any more. So I have to make up a few cases to get my fee. I need those fees to keep going.”

Such conditions are, of course, absurd. It is unthinkable in a scientific age, which prides itself on knowledge, that a judge with no learning in law should be permitted to be in a position of trying people.

These justice of peace courts, as they exist in most places, simply must be improved—or perhaps abolished entirely. And it is up to you ladies and gentlemen of the Bar, I think, to lead the way in this reform.

But I have been talking up to the present about the lawyer outside the courtroom—about the lawyer and the role he can play in improving procedure and in humanizing the lower courts.

Now, I would like to look, for a moment or two, at the lawyer within the courtroom. But too many lawyers, I am afraid, don't want to go into the courtroom. They seem to feel—some of them—that it is a bit undignified to appear before a judge and jury and audience. As they grow older they seem to prefer to stay within the sheltered comfort of their own offices and to let the younger men take on the oratory

That is a great pity, I think. For it is in the courtroom, particularly in the case of a jury trial in a criminal case, that a lawyer comes closest to the people, closest to the passions and jealousies of life, closest to the hopes and fears and little yearnings of the average American.

It is in the courtroom, too, that he is forced to appear before the people—and be judged by the people—and this, I think, is good for him. By his very mannerisms, his tone of voice, his attitude, human or impatient, toward those involved in the trial the lawyer makes an indelible impression on scores of people—and this impression is translated into an impression of the law itself.

This is especially true, I think, in the manner by which a lawyer picks and handles a jury

The jury is the very heart of American justice. It is the one aspect of legal procedure that the average citizen believes that he understands, and the one component of justice for which, I believe, he would fight to his death. I share this average affection for the jury system with an inexplicable fervor. I have watched juries in action over a period of 25 years—and my admiration for their effectiveness grows with each new calendar. I have talked with hundreds of jurors after the verdict has been read—and my pride in their earnestness and sincerity only increases.

I know the fears and worries they go through. I've seen the cavernous lines of regret cross their faces when the verdict has been murder in the first degree with only an empty silence when they might have added the word "mercy" I've watched their hands twitch nervously as they reached for their hats to go home—their jobs as citizens done.

Oh, yes, of course, many of them had objected vigorously to serving among the twelve elect. They had offered every excuse, real and fictitious, not to be sworn in. And yet when they once were seated and the trial begun I have never seen a group of men and women work more

conscientiously, more solemnly, more painstakingly than the American jury to achieve what they conceive to be justice. Despite the inept and incomplete discussion of the high importance of jury service on the part of some judges, they seem to feel within their hearts that this is a great and fundamental privilege of all Americans.

And as a rule they reach, I think, a decision that is tolerant, reasonable, in keeping with the average thinking of the community

As laymen, they do not attempt to interpret the law. They seek only to offer justice to a fellow member of the human race who they believe has as much right in the courtroom as they do. They are not primarily concerned with whether a law has been violated. But they are deeply concerned as to whether a prisoner ought to be in jail. If they think he should be, they find him guilty. If they think he shouldn't they acquit. The issue is as simple as that in the mind of the average juror.

In this connection, I should like to recall a favorite case of mine. It was a case in which three Japanese-American girls in a relocation camp in southern Colorado were charged with treason and conspiracy to commit treason. It was tried three years ago—during the war—in the federal district court in Denver.

These three Japanese-American girls specifically were charged with having helped two German prisoners of war escape from a nearby prison camp. It was clearly obvious to the jury that they were guilty. But it was equally obvious that they had helped these men escape out of bitterness, anger, despair because they had been torn away from their California homes—not in an effort to hinder their country's war effort.

So the jury found them innocent of treason and guilty of the lesser charge of conspiracy to commit treason. It was a contradictory verdict, to be sure, yet one that, in my opinion, was entirely within the thought of a tolerant and reasonable community. To me this federal jury was carrying out its responsibility in the highest sense—by grading justice to the situation at hand—a thing that a legal statute by definition can never do.

This case revealed in a practical way the truth of the phrase, carried in one of the reports of the Section of Judicial Administration of the American Bar Association, adopted in 1938, which says:

“ trial by jury is the best means within our knowledge of keeping the administration of justice in tune with the community ”

But in your relations with the jury, ladies and gentlemen of the Bar Association, are you maintaining an air of personal dignity, of tolerant calmness, of quiet persuasiveness that lie, I think, within the aspirations of the people in any community?

In the selection of a jury are you acquitting your role with the greatest possible speed, with kindness and consideration for the prospective juror, by giving the impression that you really want to reach a jury rather than to obstruct the selection?

In your pleading before a jury—in your questioning of witnesses—in the objections you make—are you doing the job in such a way that the jury feels you are seeking justice above everything else and victory secondarily?

Remember, ladies and gentlemen of the Bar Association, the courtroom is no longer an arena wherein two gladiators—prosecutor and defense attorney—devote themselves to hurling barbed points at one another. That era died with the growing of science. Today the courtroom is—or should be—and must be—a human laboratory where in the elements involved are weighed, analyzed and interpreted in the light of probable justice. And you, as a principal figure in this process, above all else must give the jury a belief that you are functioning primarily as a legal scientist—fully acquainted with all essential knowledge of the law, seeking out truth in the same way that every scientist seeks truth.

Do I, the lawyer, oftentimes fail in this, my most important role?

That is a question which I should think the most of you at intervals would ask yourselves, just as the conscientious newspaper editor frequently worries fitfully as to whether he is accepting faithfully the responsibility placed upon him by the Constitution.

Am I, the lawyer, doing my part to make the jury system function as smoothly and efficiently as possible?

This is, in reality, the same question, and the answer lies largely in the character, the honesty of purpose, the inner nature of the individual lawyer. But there is one aspect of practical jury procedure that I am sure has been considered by all of you. This is the technical method of jury selection. In far too many cases, it seems to me, the rules of procedure allow needless delay, wasted time in the selection of a jury

You simply cannot make me believe that four weeks, for example, was necessary in the selection of a jury in Los Angeles recently. There was childish delay, unnecessary speech-making, gestures before the

press, gestures before the crowded courtroom in this particular case—an all too common picture before the American bar of justice.

Why the federal method of jury selection—wherein the judge plays a major role—cannot be adopted by state courts I do not see. I believe it could be. And I believe that if it were, the achievement of justice in the state courts would be speedier and more secure. That a lawyer actually would have the opportunity of representing his client more faithfully

And that is something, of course, that every lawyer desires. There are many roles that a lawyer performs, but none of them more essential than this: That he serve his client well. For that is why there is a legal profession, that is why in Western Democracy, which sprang out of the very loins of the Roman Republic, the government always has said. It is the right of every citizen to have on his side someone who knows the law and will bring forth evidence and the law to present him in the truest light.

I know that lawyers are criticized by laymen, frequently with contempt, for representing crooks and rapists, forgers and assassins. But that is what he must always be prepared to do—to give legal help to the lowliest, most depraved, most murderous of men. If this function ever should vanish from our society, then our democratic world has vanished. In this world, which we cherish against the rising tides of arbitrary justice, we do not dispose of the probably guilty with a swift, sure bullet; we do not whisk the accused away in the dead of the night, never to be seen again, we do not herd those who have defied the law of the state away in some loathsome cattle car to the barren stretches of a twilight world.

We say that every man, no matter how black his guilt may seem to be, shall have his hour in court.

We say with the late Justice Brandeis that:

“The door of the court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as the most virtuous citizen, no record of crime, no matter how long, makes one an outlaw ”

I hope we all at all times shall remember this, ladies and gentlemen of the Bar.

I hope that you, particularly, shall remember that whenever every other function is stripped from you that this shall remain. That you

always be ready to give representation before the bar of justice to anyone who needs it.

This must be the guiding principle of your professional life, just as mine must be that I try to reflect faithfully, and without prejudice, and with fair interpretation, the human scene as it unfolds.

One of the great members of your profession, whose bones now are mingled with the New Hampshire dust, once said, "A lawyer works hard, lives well and dies poor."

The great Daniel Webster knew when he said this that all lawyers do not—nor necessarily should—die poor. But he did mean that the lawyer who dies poor with the final satisfaction that he has served his lowliest client well is far greater than the lawyer who died rich, having escaped the responsibility which the eternal tradition of pure law has placed on him.

What is pure law? In this day, when the materialism of Karl Marx is struggling to suffocate the tolerant principles of Western Democracy, there have been forces trying relentlessly to destroy the basis of true law. There are those, even in this blessed country, who would substitute government fiat, administrative command and threats of force for the deliberate, often painstakingly slow unfolding of justice as we know it.

I hope that you, as students and advocates of law, will be willing to risk your fortunes and even your lives, if necessary, to resist this relentlessly creeping force that has been the greatest threat to our lives for this generation. For if material law ever should supplant human law, then the world we have known from the days of our grandparents will have become only a forgotten desert.

Ever since I first appeared before a group such as yours I have been thinking—and worrying—and wondering about the law by which we Americans live. And one evening as I was wandering among the old pueblo buildings in Santa Fe, I formed a few words into a kind of definition. See whether you like it.

"Law"—I said—"is a measuring stick of conduct. It is the rule established by men of good will to produce the greatest contentment to the greatest number in a world that otherwise would have no order. But it is not an end unto itself. It is rather an expression of principles that change as history changes, that shift as the need for charity and mercy increase.

“Brought into existence by the mind of man, the law has all of man’s frailties. Therefore, being strong in one generation and inadequate in another, as the races of men are, it must be subject to perpetually changing interpretation. But throughout these changes in interpretation it must always have as its indestructible goal the burning resolve that the lowliest of men can come before it and be judged without personal prejudice, without malice, without contempt. The law is—or should be—and must be—the unassailable faith of a free people who voluntarily have accepted these restraints so that none of their number need go to the grave with the black belief that life was set against him.”

Ladies and gentlemen of the Wasington State Bar, whether this is a good definition or not, it is nonetheless the effort of a layman observer to place into words before you the greatest goal of civilized life—the goal that you in your profession ever must be seeking—the goal of human justice.

No goal can exceed it in importance. For out of justice grows all that we Americans have—or can hope to have—in our scattered years on earth.

I envy you, ladies and gentlemen of the Bar, for having always at your fingertips the possibility of attaining for someone this greatest of all goals. May your reach never fall short.

Thank you. (Applause)

### **Report of Resolutions Committee, by D. V. Morthland**

Ladies and gentlemen of the convention, the following are the proposed resolutions and recommendations of the Resolutions Committee:

“We extend our sincere thanks to the Bar Associations of Skagit and Whatcom Counties for the generous hospitality they have provided for us, especially we wish to commend George McCush, chairman of the general committee, and his assistant committees for the arrangements which were made for our comfort, and particularly for the unique repast furnished us last evening on the occasion of the salmon bake.

“We also wish to commend the newspapers of Bellingham for the adequate and generous coverage they have given the proceedings of the Association.

“We heartily endorse and urge the passage of House Resolution Number 1639 (Jennings Bill) recently passed by the House of Repre-