CHAPTER III

THE PRESIDENTIAL ADDRESS

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My good and able friend, Perry Horlacher, Program Chairman for this meeting and widely known in the Puerto Rican labor-management community because of his minimum wage activities, adventitiously inserted in the program announcement of this meeting a statement that the presidential address this year would be "unusually significant." I know now what our critics mean when they decry arbitral usurpation of power. Perry had no authority "to add or to subtract from" the contract between us. I simply agreed (or rather was bound by past practice) to give a presidential address, and there was no covenant, express or implied, that the address would be "unusually significant." Indeed, there could be no "past practice" from which such an implied agreement could arise.

In any event, I want you to know where the responsibility lies for this bit of advertising which, I am sure, brought you breathless to San Juan. In the few minutes of constraint which my place on the program places upon your very understandable desire to escape to the beach, I will simply reflect, I hope, the views of most of us in the Academy on some rather obvious points of history, current fact, and concern.

I want to begin by expressing to our Puerto Rican friends our warm appreciation for the wonderful hospitality you are showing us here in San Juan. This occasion marks the first venture of the National Academy of Arbitrators outside the United States mainland. That we are here indicates, perhaps, that we have come of age as a professional association (although we have not yet gone

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on a working cruise). Our decision to come here was motivated in part, to be sure, by the desire to escape, for a time, the rigors of much of our mainland winter climate. But this we could have done, presumably, in certain places on the mainland. We chose Puerto Rico over Florida and Southern California, in part because of its wonderful climate, but also because Puerto Rico represents, in all the world, a unique experiment in government and political philosophy, and in imaginative solutions to problems of human welfare. I refer, of course, to Puerto Rico's "commonwealth" status in relation to the United States. I refer also to the remarkable insight and dedication of the Puerto Rican government and people, over many years, under the leadership of former Governor Muñoz, and now Governor Sanchez, in the attempt to solve the very formidable economic and social problems besetting the people of this island. They have achieved a large measure of success.

I would remind you of some of the salient facts. With a population of some 2,600,000, Puerto Rico has a population density which is one of the highest in the world. If the United States mainland were as densely populated, it would have 1,500,000,000 inhabitants. Population pressure, combined with limited natural resources, has created severe economic problems. Yet, under wise and energetic island leadership and, ultimately, with the enlightened cooperation of the mainland government, whose attitude progressed from fumbling indifference to awareness and understanding, Puerto Rico has taken gigantic strides, such as now to be the showcase of the Caribbean. Between 1940 and 1960 production tripled, personal income tripled, the percentage of families earning less than $1,000 per year was reduced from 46 percent to 24 percent, wages increased from an hourly average of 19 cents in manufacturing to 89 cents, and since 1960 have reached $1.26. In the period 1952 to 1965 per capita income rose from $370 to $900, and average family income rose from $1700 to $4100. In 1957, 186,000 tourists spent some $28 million here; by 1965, the number of tourists exceeded 300,000, and their total spending was in excess of $100 million. San Juan is the busiest commercial air center in the Caribbean, and more than 25 steamship companies provide freight and passenger service to the island.

This economic progress has been due in considerable measure to an ingenious program labeled "Operation Bootstrap." By 1965

there were approximately 1200 "promoted" industrial plants in operation on the island. With this has come increasing unionization of employees and collective bargaining, a system nurtured by the same basic laws which set the legal framework for labor-management relations on the mainland. Both mainland as well as indigenous unions are active here in the representation of employees.

Progress has not simply been in matters of economics. With economic progress has come fundamental human progress of other kinds. Puerto Ricans are a literate people. More than 80 percent of the total population of school age (6-18 years) is enrolled in private or public schools. The literacy rate of Puerto Ricans ten years of age and older reached 90 percent in 1962 and is doubtless higher today. Standing at the pinnacle of the education system, the distinguished University of Puerto Rico has a student body of upwards of 25,000. The President of the University will be our speaker Thursday evening. Puerto Ricans are a healthy people, now. Between 1940 and 1960 average life expectancy rose from 46 years to 71 years. Public health is the second largest item in the Commonwealth budget. Major problems of disease, which ravaged the people in years past, have been largely solved.

This, then, is the island to which we have come. We salute its progress and its ideals, its bold experimentation, and its dedication to principles of political and industrial democracy. We in the Academy feel that we are a part of the process of industrial democracy, and we hope, in the course of this our 19th Annual Meeting, to share with our Puerto Rican friends and among ourselves some basic facts about the process as well as its problems and aspirations.

First, let me remind you of the reason why labor and management, acting together, give acceptable third parties authority to resolve disputes. Very simply, it is because they believe the process of settlement by collective bargaining with recourse to arbitration is more satisfactory than the alternative of collective bargaining alone, with or without the right to use supportive economic force, or to litigate. In general they believe, moreover, that despite the risk of some weakening of collective bargaining if there is an advance commitment to the use of arbitration where agreement fails, some kinds of disputes, primarily those involving rights and

obligations during the term of a collective bargaining agreement, should be subject to ultimate resolution by arbitration. This is basically the labor dispute arbitration system as we know it and as it is generally practiced on the mainland. It should be noted, however, that there would be arbitration, arbitrators, and in all probability a National Academy of Arbitrators even if arbitration were not made an advance commitment as a part of the collective bargaining agreement, but were left to *ad hoc,* case by case, mutual decision.

What has happened, of course, is a phenomenal adoption and acceptance in the United States of the use of arbitration in the area of labor contract grievances, primarily since World War II. I know of no parallel for this development. In other industrialized countries where workers are organized, these kinds of disputes are either largely neglected, at least until the next round of contract negotiations or are left to resolution, if possible, by collective bargaining at the plant level (as in England and certain western European countries), or are subject to settlement through litigation in special labor courts (as in West Germany and Sweden). So, we are engaged in the United States in a large scale experiment.

Dispute settlement by private arbitration is by no means novel in the history of human affairs. Our originality consists only in our application of the process to labor disputes. In biblical times King Solomon was famed for his skill as an arbitrator. As has been stated by one of our members, Ted Jones, "arbitration has an ancient lineage, and the judges and arbitrators of this era would do well to reflect on it." [1] Jones refers to the researches of Professor John Dawson of the Harvard Law School [2] in pointing to the widespread use of the private citizen as "arbitrator-judge" in ancient Athens and Rome, and to the fact that this was the exclusive process of decision-making used during the great creative phase of Roman Law of the first 500 years. Jones also points out that there is much evidence of resort to private arbitration in France in the 12th and 13th centuries, in Germany in the 15th century, and in England during the reigns of Queen Elizabeth and James I. In some respects the earlier English experience with

[1] Jones, "Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses," 11 *UCLA L. Rev.* 675-701 (1964).
[2] Dawson, *A History of Lay Judges,* 13-29 (1960).

guild tribunals, the merchants courts, and the development of the so-called "law merchant" were analogues to the modern grievance arbitration process as developed in the United States. These several systems have had in common the fact that the "law" or "rule" applied by the third party has not been part of the general legal code or system of the time, but rather the product of the agreements, usages and conventions of the group employing the process. As in the case of the old law merchant days, one result of the use of arbitration to decide grievance disputes has been the development of a kind of industrial law, both for the plant and at large.

The traditional view of the arbitration process was stated very well by the late Harry Shulman, in his famous Oliver Wendell Holmes lecture of February, 1955;[3]

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not."

Despite the larger and less circumscribed role of the arbitrator depicted in the opinions of Mr. Justice Douglas in the famous 1960 Trilogy "arbitrability" cases, I think most arbitrators continue to feel that their role is the more modest one described by Shulman.

The common assumption is that this use of arbitration to resolve labor disputes has been a constructive development, on the whole. The process has naturally resulted in the gradual identification of a group of people who do most of the arbitration work. These people, as they have acquired experience, have come to believe that labor dispute arbitration, as practiced in the United States, is not only a profession, but a skilled if not a learned one, and one which should be dedicated to high standards of ethics. These principles are incorporated in the Constitution of the Academy in the statement of its purposes: "to establish and foster

[3] Shulman, "Reason, Contract and Labor in Labor Relations," 68 *Harv. L. Rev.* 999 (1955).

the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of industrial disputes on a professional basis . . ." It is commonly assumed further, at least by most arbitrators, that if the voluntary arbitration process, as we know it, were not regarded as a sound development, the process would be repudiated by the parties who have sired it and who can, unlike human parents, disavow their offspring without legal liability.

Yet the institution of labor arbitration has its problems and its critics like most other human institutions. We of the Academy, perhaps more than most other professional groups, have indicated our concern and our awareness by opening the forums of our annual meetings to our critics and to a consideration of problems, whether real or imagined. The vast majority of our critics, I am sure, are also our friends, and criticize not to oppose but to improve an institution they basically accept. They refer to such matters as increased costs, time lags, arrogation of authority by arbitrators, procedural deficiencies, inadequacy of supply of competent arbitrators, bad decisions, bad opinions, unsound principles, and the like, even as our judicial system and judges are often criticized. Criticisms like these should be examined carefully as to validity, as to the question of responsibility for the problem, if it exists, and with the objective of finding solutions. Any institution, if it is to remain healthy, must be subject to continuing constructive examination. We in the Academy accept this as a fact of life.

There is another kind of criticism, however, of which I want to take note. This is the kind that attacks the basic assumptions underlying the arbitration process and, more than that, even questions its integrity. The prime example of this in recent times is the scathing and, as it seems to most of us, almost unaccountable denunciation voiced last spring by Judge Paul Hays as the Storrs lecturer at Yale Law School.[4] His attack was the more surprising and perplexing, and at the same time the more disturbing and noteworthy, because of his eminence as a federal court of appeals judge, a labor law professor, a former arbitrator, and a former member of this Academy. These circumstances, plus the far reaching and basic character of some of his strictures, make it difficult

[4] Hays, "The Future of Labor Arbitration," 74 *Law Journal* 1019 (1965).

for responsible participants in the arbitration process to ignore his criticisms, some of which call for serious consideration rather than summary "answer" in the forensic context.

In Judge Hays' view, there is no expertise in labor arbitrators qua arbitrators. The only expertise ever found in an arbitrator, and this only rarely, derives from the purely accidental fact that he happens to be a lawyer or law professor having sufficient qualifications to be a judge. He asserts that "in literally thousands of cases every year decisions are made by arbitrators who are wholly unfitted for their jobs, who do not have the requisite knowledge, training, skill, intelligence and [please note] character."

His use of the term "character" is not inadvertent and obviously derives from his next statement, as follows: "In fact, a proportion of arbitration awards, no one knows how large a proportion, is decided not on the basis of the evidence or of the contract or other proper considerations, but in a way calculated to encourage the arbitrator's being hired for other arbitration cases." Then he delivers the coup de grace in the following words: "It makes no difference whether or not a large majority of cases is decided in this way. A system of adjudication in which the judge depends for his livelihood, or for a substantial part of his livelihood, or even for substantial supplements to his regular income, on pleasing those who hire him to judge is per se a thoroughly undesirable system." His conclusions, he states, are "based upon observation during 23 years of very active practice in the area of arbitration and as an arbitrator, and from suggestions in the more intelligent literature in this field." With a slight bow to objectivity, he does note that these conclusions he has reached "pending scholarly studies and evaluations."

I have some difficulty, frankly, trying to account for this violent, and with all due deference, injudicious onslaught. If there were incidents in the judge's own experience as an arbitrator which drew him, ineluctably, to his present state of mind, I think he owes it in all fairness to the profession and to the labor-management community to produce the record, so that it may be judged. I really think the explanation may lie, in part, in the judge's obvious resentment of the restraints which the Supreme Court of late has placed upon judges in their relationship to the arbitration

process. Like the late Harry Shulman, Judge Hays would leave arbitration to its own devices to stand or fall, case by case, without support by the courts in any respect. Unlike Shulman, however, he believes the process is almost wholly bad, and should be replaced by judicial determination by special labor courts or expedited proceedings in other courts.

Now I am not at all sure that arbitrators or Academy officials are the persons who should respond to Judge Hays' claims and charges. Nor, actually, do I think it really necessary to respond. As to assertions as extreme as his, the *very fact* of the continued and increasing use and acceptance of arbitration is the best evidence of their basic falsity, although I suppose cynically one should recognize the possibility that the alternatives to arbitration, including resort to judicial determination of grievances, are regarded by the parties as even more unpalatable than arbitration, bad as arbitration is. That is to say, in this imperfect world, one has to do the best he can.

I think, however, that the interests of all who are concerned with the arbitration process demand that certain of Judge Hays' assertions of fact be met with more than a simple denial. One is the judge's claim that the arbitration process lacks integrity because arbitrators, being employed and paid by the parties, must remain "acceptable" to survive, and, since the parties are adversary, this makes fair and objective, and perhaps even honest, decision-making and opinion-writing impossible. I would like to see this matter carefully examined because it is my impression that a good many people who are not basically hostile to arbitration think there is an element of truth in the claim, although they do not regard the arbitrator's supposed responses to his problem of "acceptability" as deadly sins. Indeed, they may even think that the total labor-management-third party relationship is better off, or at least more viable, because of this frailty of human nature.

I think we have not candidly and openly faced up to this matter, and that it would be useful and healthy to do so. I suggest as an initial step that some member of the Academy undertake to do some serious soul searching between now and the next annual meeting, and come forward with an analysis of the problem in all

its aspects, attempting to identify all possible elements of impact of the acceptability syndrome, if that is what it is, and to mark out areas in which other investigation is needed and could be productive. Obviously, the person taking this assignment should have extensive experience, a high degree of sophistication and intelligence, and total objectivity and candor (but this is true, of course, of any of you Academy brothers, so there is no problem here). As a second step, a major research effort in this area should be undertaken by thoroughly skilled outsiders. I am sure there are research tools and capabilities adequate to the task, difficult as it may be. It would be interesting to include in the survey some comparative findings. Are arbitrators less objective, less fair, more inclined to try to please than are, say, elected or even appointed judges?

The second Hays claim which I would add to our agenda of items for investigation and research is his assertion that arbitrators possess no special expertise, as such, in the decision of labor contract interpretation issues. Now, I am not sure it is essential to the validity or desirability of the arbitration process that this matter be settled. Arbitration could perhaps stand alone on other virtues, including speed and finality. But I think we in the Academy now assume and believe there is a certain skill, if not prescience, that derives from knowledgeable experience in adjudicating in the labor relations context, and, as we all know, the U.S. Supreme Court, or at least Mr. Justice Douglas, certainly believes this to be the case. But, whether or not possession of expertise is central to the arbitration process, or to its validity, I rather think we would all profit from an intelligent inquiry into this matter. What are the hallmarks of expertise in deciding grievances? What are the proper criteria for determining whether expertise exists? Do arbitrators have it or don't they, and what of judges? This inquiry should be approached with humility. One is reminded of a pertinent observation by Judge Cardozo: "I am often at my wits' end to satisfy myself—let alone to satisfy others—as to the qualities that go to the making of a wise and useful judge. It is pretty hard to say. When one looks back at one's work and tries to estimate it impartially, one has hours of disillusionment,

hours filled with wonder whether one has been traveling on the right track or the wrong one or on any track at all."[5]

There are other matters that should be investigated carefully. Some will require a serious research effort. Others can appropriately and better be handled on a discussional deliberative basis by persons directly interested, including representatives of the parties. An example of the latter, which represents an innovation in the work of the Academy this year, is the consideration of "Problems of Proof in the Arbitration Process" by the four tripartite committees (from New York, Pittsburgh, Chicago, and Los Angeles, respectively) who are reporting at this meeting. (Incidentally, I want to pay my own respects and extend the thanks of the Academy to these committees. I think the probability is that out of their deliberations, and the group discussions at this meeting, will appear in our next published Academy Proceedings the best treatment yet of a very complicated and highly important subject.) It may interest our critics as well as our friends to know that the Academy has been attempting to stimulate foundation interest in financing a program of study and research in relation to the arbitration process. If Academy sponsorship of certain research efforts should be regarded as unseemly or inappropriate, we would hope that other sponsorship, perhaps by universities, could be obtained. Our only concern is that appropriate measures be taken, whether by the route of deliberation or research, or some combination, to identify and analyze problems and to move toward their solution.

Meanwhile, the role of the mutually selected third party in industrial relations seems to me to be expanding, and I think it will continue to do so. There is some use of third parties as private mediators in major collective bargaining disputes. Despite the efficiency of governmental mediation agencies, this kind of use of third parties may well increase. I would guess that over the next decade there will be increasing use of private arbitration to resolve collective bargaining disputes, or certain issues in such disputes, perhaps within the framework of negotiated standards of decision. I suggest that this is one of the likely developments

[5] Address given December 17, 1931, before the New York County Lawyers Association, New York Lawyers Publication 1931—369, reprinted in Hall, *Selected Writing of Benjamin Nathan Cardozo,* 100 (Fallon Publications: 1947).

in those industries or situations where both public and private interest require, as a practical matter, abnegation of the use of the lockout or the strike. A potentially vast area for the use of privately selected third parties is in connection with the rapidly developing regime of public employee unionism resulting, at the federal level, from Executive Order 10988 and, at state and local levels, from progressive legislation such as that recently enacted in Michigan, Minnesota, Wisconsin, and Connecticut. Bargaining unit determinations, grievance adjudication, and basic collective bargaining disputes all lend themselves to the third party process, whether the findings are advisory or binding.

At the less dramatic level of labor contract grievances the role of the mutually selected third party will, I believe, increasingly involve such non-traditional functions as informal reactions in "dry-run" grievance screenings, pre-arbitration advice, and, either by open invitation or tacit acquiescence, mediation in lieu of arbitration. I know for a fact that some arbitrators, under some circumstances, during the course of an arbitration hearing will initiate mediatory action, frequently with outstanding success in resolving the particular dispute in a way which responds to the real needs of the parties more fully than could an adjudicated decision. This is a delicate matter. Obviously, the attempt may be risky and, in some cases, unfortunate. And, to be successful, the arbitrator in this situation must be one who has a high degree of sensitivity to the supersonic and sometimes barely discernible wave lengths arising in the hearing room. Without in any way intending to revive the hoary debate concerning the appropriate role of the arbitrator, I suggest that there may be developments in this area worthy of investigation and consideration.

This concludes my remarks for the day. To our Puerto Rican friends who are not, thus far, involved in the arbitration process, may I say that I hope I have shed some light on the nature of the process. To our members and our guests who have been using the arbitration process, may I note that I have supplied, certainly, no information of which you have been unaware and, I hope, no concept which most of you do not share. I trust I have voiced some of our more uniformly held sentiments with respect to the arbitration process as we have known it, and concerning desirable procedures for identifying its problems and moving toward their

solutions. I have also, and without, I trust, delusion or beguilement, expressed some views about the future role of mutually selected third parties in the resolution of labor-management disputes. As to this you may be enchanted or disenchanted, agree or disagree. If I am right, third parties will have ever increasing responsibilities. If I am wrong, the responsibilities will still be large enough.

A famous American said, "Justice, sir, is the greatest interest of man on earth." In our own limited sphere of jurisdiction, we are participants in this quest for justice. I would like to think that each of us would aspire to merit the kind of tribute recently paid by a Japanese after hearing a distinguished British sociologist discuss his year in a small Japanese village: "He brought to his work ideal tools for the task—a sharp eye and a warm and understanding heart. His warm heart kept the sharp eye from ever becoming too offensive; but the sharp eye kept the understanding heart from ever beclouding objectivity."