

# Umpires Strike Back

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On Thursday, December 13, 1951, Justice Robert H. Jackson spoke at the New York County Lawyers' Association's annual dinner, held at the Waldorf=Astoria Hotel in Manhattan. The Association and its 1,000 guests that evening honored senior federal Circuit Judges (and cousins) Learned Hand (age 79, and a judge since 1909) and Augustus Noble Hand (age 82 and a judge since 1914). To close the program, Justice Jackson delivered a "benediction" speech that included a now-famous line: "if I were to write a prescription for becoming the perfect district judge, it would be always to quote Learned and always to follow Gus."<sup>1</sup>

Justice Jackson also paid tribute to the Judges Hand that evening by drawing the analogy between an excellent judge and a baseball umpire. As Jackson put it,

the test of an independent judiciary is a simple one—the one you would apply in choosing an umpire for a baseball game. What do you ask of him? You do not ask that he shall never make a mistake or always agree with you, or always support the home team. You want an umpire who calls them as he sees them. And that is what the profession has admired in the Hands.<sup>2</sup>

In recent years, the umpire-like work of judges has been described as much more mechanical than volitional. In 2005, then Circuit Judge John

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For a selected archive of Jackson List posts, see my homepage at [www.law.stjohns.edu](http://www.law.stjohns.edu). To subscribe to the Jackson List, which does not display recipient identities or distribute their email addresses, send a note to [barrettj@stjohns.edu](mailto:barrettj@stjohns.edu).

<sup>1</sup> Robert H. Jackson, *Why Learned and Augustus Hand Became Great* (Dec. 13, 1951), available at [www.roberthjackson.org/documents/Why%20Learned%20and%20Augustus%20Hand%20Became%20Great.pdf](http://www.roberthjackson.org/documents/Why%20Learned%20and%20Augustus%20Hand%20Became%20Great.pdf).

<sup>2</sup> *Id.*

G. Roberts, Jr., nominated to serve as Chief Justice of the United States, testified to the Senate Judiciary Committee that

[j]udges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.<sup>3</sup>

Chief Justice Roberts was, of course, confirmed. In the process, his description of judging as mere rule-applying umpiring became a topic of much attention and discussion. Among lawyers, law professors and judges, the consensus view seems to be that the Chief Justice knows better, and that confirmation candidate advocacy should be recognized for what it is.

Interestingly, a captivating new book, NEW YORK TIMES reporter Bruce Weber's *AS THEY SEE 'EM: A FAN'S TRAVELS IN THE LAND OF UMPIRES*, takes direct issue with the robotic, rule-enforcer view of umpires' work. According to Mr. Weber,

[t]hough fans and broadcasters may treat the [home] plate umpire as if he were a mere ballot counter, punching the ticket of each pitch as it crosses the plate and acknowledging its ostensibly obvious credentials, in truth he's much more of an arbitrator, keeping the most contested area on the ball field from being taken over by one side or the other.<sup>4</sup>

Mr. Weber's account of the umpireal job is not just his opinion. He quotes from major league umpires who explain their work as involving autonomy, responsibility and opportunities for judgment that resemble the work and responsibilities of, well, judges. The author explains that during two-plus years of attending umpire school and then interviewing almost 200 umpires and other baseball people,

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<sup>3</sup> CONFIRMATION HEARING ON THE NOMINATION OF JOHN G. ROBERTS, JR., TO BE CHIEF JUSTICE OF THE UNITED STATES, Hearing before the Committee on the Judiciary, United States Senate, Sept. 12-15, 2005, Serial No. J-109-37, at 55 (testimony of Judge Roberts, Sept. 12, 2005).

<sup>4</sup> BRUCE WEBER, *AS THEY SEE 'EM: A FAN'S TRAVELS IN THE LAND OF UMPIRES* 172 (2009).

[m]ore than one major league umpire spoke to me of calling balls and strikes as a kind of political enterprise, an activity requiring will and conscience and a point of view.

“It’s like the Constitution,” [current Major League Baseball umpire] Gary Cederstrom said to me. “The strike zone is a living, breathing document.”

When I asked [MLB umpire] Tim Tschida why balls and strikes provoked so many arguments and so much enmity, he responded by comparing the rulebook strike zone to one of the most controversial Supreme Court decisions of the twentieth century.

“Have you ever read *Roe v. Wade?*,” Tschida said. “It’s very clear. What it says is *very* clear. And we’ve still been fighting for twenty-five or thirty years over what it means.”<sup>5</sup>

It seems, at least according to these umps, that Justice Jackson (who was, by the way, not a baseball fan) had it right about both their work and his own. Indeed, Jackson in his 1951 speech about “umpires” Learned and Augustus Hand seems to have been channeling some of the wisdom of one of that era’s, and humanity’s, greatest “judges”: an umpire’s qualities must include, said Branch Rickey, “the discretion of a judge....”<sup>6</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *See id.* at 1.