Indiana Law Journal

Volume 16 | Issue 1 Article 5

10-1940

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NON-PARTISAN SELECTION OF JUDGES

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The judicial function was probably first invoked when the third human being appeared on the earth. It may easily be imagined that a dispute arose over some legislative act of Adam, affecting his first born son, and that the matter was referred to Eve. So we had a woman as the first judge. It is not improbable that in announcing her decision she gave Adam one of those withering judicial looks and scornfully said *"De minimus non curat lex,"* thus pronouncing the first Latin maxim. It may also be assumed that in rendering judgment she put her own construction on the legislative act under consideration, and thereby originated an uninterrupted custom of judicial legislation which still continues to irritate men. Moreover, since there was an exercise of judicial function in construing the edict of Adam, the decision of Judge Eve was the original authority for the statement of Chief Justice Hughes, that the law is what men say it is. So the human race commenced with a government of the genus homo, female, not of laws. And yet credulous people believe there is something new under the sun.

The judicial function, exercised down through the ages, led to the establishment of the judicial office. History tells us that judges were originally the vassals and servants of military chieftains, petty rulers, or of more important and influential monarchs.

Through a long process of evolution, the time arrived when it was natural to have an independent judiciary.

It is said that during the American Colonial period, although judges were for the most part unlearned, they were independent. Up to the turn of the last century they were as a rule chosen by appointment of the executive or the legislative department. By 1840 election by popular vote had become very general. It is noteworthy in the history of Indiana to recall that under the constitution of 1816, the Supreme Court judges were appointed by the governor, the president of the circuit court by the general assembly; as-

* An address delivered by L. L. Bomberger at Fort Wayne, August 24, 1940.

sociate justices, with very little power, were chosen by the electors of the district. Indiana, however, got in line in drafting the constitution of 1850, and thereupon judges were definitely and inexorably tied in with party politics, and have ever since been subject to the vicissitudes of political fortune.

It is paradoxical indeed and in a sense ironical, but nevertheless true, that our rugged frontier statesmen of the first half of the last century did three noteworthy contradictory acts concerning the administration of justice. First, they properly adopted a code of practice, but over against that they definitely lowered the standards of admission to the Bar and put judges into politics. When we remember that the administration of justice is after all dependent upon the judge, and the well qualified personnel of the judiciary must be relied upon for efficient and impartial discharge of the judicial function, we may well deplore the shift that was made in 1850. It were better had the common law practice been continued, with all its cumbersome attributes, but used and administered by trained lawyers and independent judges. This thought has been well put in the report of the Judicial Selection Committee of the Conference of Bar Association delegates of the American Bar Association of 1935: "Given a judge of sound judgment, learned, courageous and independent, and justice will be well administered under almost any system of laws. Given a judge unlearned, timid, and whose horizon is the next election, and justice will be poorly administered under the best system of laws."

These things were done, however, in an age when there was resentment in various forms against the alleged autocracy of the Bench. Such sentiment was expressed in the Constitutional Convention of 1850 by the presentation of a resolution to inquire into the expediency of abolishing the supreme court and proposing a substitute therefor, whereby a speedy and impartial trial of all appeals and writs of error might be had. After a lapse of ninety years, there is evidence of the fact that the same cause of dissatisfaction still obtains in some degree.

The subject of judicial independence from political influence has provoked the writing of literally volumes. It is impossible to review or even to quote freely from what judges, leaders of the Bar, and laymen have said on the subject.

It is said that the United States and Switzerland are the only countries in which judges are generally selected in political elections. Statistics compiled in 1938[1] show that in the United States 11 states have provisions for total or qualified appointment of judges; 23 states elect them on party tickets; 14 elect without political designation. This report of these figures says:

> "In Indiana there is no such thing as a non-partisan selection of a judge for any state court; the selection is in the hands of political machines."

Is it desirable that judges should be subjected to the hazards of political fortune? This question was the subject of a spirited discussion at the annual meeting of our association in 1900. It was finally determined at this meeting that candidates for judicial office should not be solicited for contributions to a political campaign, but that they should be free to contribute without solicitation. The counterpart of this naive evasion is still with us. The subject has been debated at numerous meetings, and various resolutions adopted throughout the history of the organized Bar.

In 1916, twelve of the thirteen lawyers on the House Judiciary Committee voted against a bill for the non-partisan selection of judges, on the ground, frankly admitted, that it was their wish to keep the judicial offices in politics. Certainly it may be accurately said that sentiment has undergone a change since that time, and not only would the Bench welcome freedom from politics, but lawyers and laymen in increasing numbers are coming to appreciate the necessity of it.

On other occasions I have listed some of the evils of the political elective system. This catalog will not be repeated here, but I wish to confirm with emphasis all the criticisms heretofore made.

Moreover, time furnishes us new illustrations of the perfidious and destructive possibilities of selecting judges at political primaries or conventions.

When a responsible lawyer of the highest standing declares, in the nation's second largest city, that court decisions are bought and sold therein, he discloses a condition which marks the disintegration of democratic government.

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[1] Report Am. Bar Assn. 1938, 406.

But Indiana presents her own examples. Surely all people of understanding must have been profoundely moved to righteous indignation at the activity within the present year of a highly organized group that set about, and successfully too, to accomplish the defeat for renomination of a justice of the Supreme Court of this State. No flaw was found in his character or professional qualifications. The sole objection was that he is a member of a court, the majority of whom declared the law to be against the contention of this pressure group. The most alarming significance of this attack is that it came from the servants of the state who are employed, with practically a life tenure, to educate our children. Indiana must confess with anything but pride that she has entrusted the vital rudimentary instruction of her youth, the future managers of the state, to those who as a group, would undermine the independence of one coordinate branch of the state. For this group has definitely made it known that it would destroy the fearlessness, independence and judicial integrity of those who sit upon our highest court. If such intimidation is a menace to the highest court, it can reach all the courts. Moreover, other organizations with definite objectives can bring like pressure, and some of them have done it heretofore. But until now we have been spared this penetration into the bracket of the assumed highest intelligence and especially those to whom we entrust the training of our youth. This training is distorted and the philosophy of democracy lost to those who should be brought up in a true understanding of it. If the Supreme Court is first to ascertain the wishes of the Teachers Federation in one case, shall it not seek such information from other groups in other cases? Instantly, under this formula, the Court is no longer an independent branch of the state, but merely the agent of the organization it assumes to be the most powerful at the ballot box.

This assault on judicial independence would be deplorable enough if it arose only out of a misconception of the relations of the three departments of government and their status in the whole scheme. What many people seem not to have learned is that justice does not always coincide with their bent nor their desires. The fault may be in our system of education, but whatever it reflects calls for heroic measures.

Political managers have been known to seek and obtain, apparently without reluctance, informal opinions of members of the Supreme Court concerning the validity of proposed legislation. If a judge participates directly or indirectly in the preparation of a law, how can he be expected to pass upon it without prejudice if and when it is presented to the court for judicial consideration? What, outside the reach of the Criminal Code, can more effectively destroy the confidence the people should have in the impartiality and independence of the courts?

No one will contend that a judge should be sufficiently independent to be arbitrary, but he must always be sufficiently so to do justice. Undoubtedly there is in the ideal judge that fine blending of character and mentality to administer justice fearlessly and impartially without deciding arbitrarily. The judge must be independent of everything except the law and the facts of the case, keeping in mind that necessary, though sometimes vague, adjustment between so-called private rights and the legitimate demands of the existing social order. In this respect, however, there should be distinction between freedom to keep in touch with the spirit of the ages and merely the spirit of the age. So, it may be asked, how can a judge possess that necessary balance and poise required to pass impartially upon conflicting demands in a case with his eye, as Mr. Dooley said, on the election returns.

Conceded that in the great majority of cases the inquiry is not whether judges yield to improper motivation, yet unqualifiedly it must be said that they have a right to be free from the pressure. They must not be in the miasmic fog of the "very appearance of evil."

While the case is clear upon grounds stated for saving our judges from the temptation to surrender to political influences, it rests upon a much broader basis. Judicial impropriety, happily, is comparatively limited, but there is no substitute for an experienced, upright, capable judge. Very definitely the public interest demands that such a man remain in office. Whether or not the people should reserve the right to pass judgment upon his record at stated intervals may be debatable, but if such reservation rests with the people, the candidate, especially if he has served in a judicial capacity, should be rated for the quality of his official service and not for political affiliation.

There is not the slightest relation between fitness for judicial office and the status of a political party with respect to public favor. People get along about as well with either party in control of local administrative and executive offices, and the shifting of political sentiment is comparatively harmless—indeed, probably beneficial—in assuring the probity of conduct of incumbents of such offices. But it is precisely such uncertainty from which the judicial office, to function properly, must be free. While it must be conceded that acceptable judicial timber is found in both leading parties about in proportion to the whole number of lawyers therein, it cannot be over-emphasized that the desirable candidate should not fail nor the undesirable succeed, on the wholly irrelevant fate of his political party.

Already, politicians, and especially candidates for local offices, are beating the tom-toms for presidential candidates in order to ride into office with the one for whom they can arouse greater public favor. They play up national issues for local results. In close counties, especially the more populous ones, in this year 1940, judges may be swept out of office or retain their seats, as the case may be, utterly without regard to their own merits, but only on the wholly unrelated issue of who should be the next president of the United States.

Moreover, the turn of the wheel of political fortune has cost untold amounts in prolonged litigation begun before inexperienced or incompetent judges, whose errors could only be corrected, if at all, by expensive and delayed appeals.

Every consideration which prompts the Bench and Bar to seek for improvement in the administration of justice demands that the only test to be applied to candidates for judicial office is that which ascertains their fitness to serve. This test is not found in a party lever on a machine ballot.

But someone, possibly representing a majority of the members present today, will say that judicial selection through political parties works very well in his home county; but he cannot dismiss the subject by considering the experiences of the less populous areas of the state.

It has been truly said that the chief menace of the political bench lies in the larger centers of population. Indiana has such centers, and criticism has freely arisen in some of them. But the rural districts are definitely, if not directly,

menaced, for the destruction of an independent judiciary will not be limited to urban areas; it will spread like a contagion into the remotest parts of the state, imperilling those who smugly bask in self-sufficient isolation. The destruction of all our liberties will follow the deterioration of our courts.

We may well heed the admonition of the American Bar Association Special Committee on the subject of judicial selection and tenure, appearing in the annual report of 1939[2]:

> "The peculiar difficulty today in advancing projects for better methods of judicial selection is found in the fact that by many it is regarded as a movement to the right at a time when the general trend is to the left. If, however, we are to escape the evils so apparent in Russia and in Germany, we must rigorously adhere to our civil and political guaranties while we try to effect economic reforms. We know from the experience of people under the dictatorships that economic security in exchange for our civil liberties would be merely a trade of our birthright for a mess of pottage. The very extension of the influence of government into new fields of human endeavor makes more necessary than ever untrammeled tribunals for the maintenance of justice—man's highest worldly concern and the prime object of the state. * * *
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> "In view of present world conditions the problem of judicial selection assumes a new and deep significance. Undoubtedly the foremost question of the day is, Can democracy be saved? And those who seek earnestly for an affirmative answer are brought to the realization that the greatest danger is not from without but from within. Autocracy prevails generally where democracy has failed. If democracy is to be saved it must be made and kept efficient. And the most important element in democratic efficiency is a system of independent courts for the maintenance of justice against power and the protection of civil liberties against tyranny."

Let us go back, as I have had occasion to do heretofore, to the words of the distinguished first president of this association. General Harrison said, "Anything that tends to diminish the respect of the public for a judge tends to the

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[2] Report Am. Bar Assn. 1939, 327.

public injury." We may just as well attempt to escape living with our conscience as to ignore the truth of this declaration.

The people of Indiana will soon have the opportunity to choose representatives who will be called upon to give us a substitute for politically chosen judges. A bill has been approved by the Judicial Council and by other organizations of the state, which will do as much as can be done without a constitutional amendment, to alleviate the present unsatisfactory situation. That bill will permit any one who can obtain sufficient petitioners or signers, to be a candidate at the May primary without political designation. The two candidates receiving the highest vote in the primary will run off at the fall election on a paper ballot without party designation and entirely apart from any political ticket. After careful study and analysis of the problem from every angle, this has been accepted as probably the most satisfactory solution to offer at the present time. It is true that it will be possible, especially in more populous counties, for pressure groups to organize behind candidates, but this will have to be dealt with by intelligent and impartial people when it arises. Although the proposal is limited to judicial offices below the Supreme and Appellate Courts, it offers the initial step to bring about a measure of independence that is surely worth the effort.

It may be assumed that most sitting judges of the state will heartily approve of this method of selection, especially where they have reason to believe their services have been satisfactory. It may and should be the doom of bad judges. But one can look about the state and feel assured that with comparatively few exceptions the now sitting judges will be retained as against any rivals on a non-partisan ticket.

Illustrations are plentiful of situations where right thinking people prefer to see a judge survive political revolutions. The only sure method of immunity from these upheavals is to keep him off our party tickets.

If there is a central theme of this meeting, and it appears so, it certainly has to do very definitely with the liberty that is vouchsafed to us. The assurance of liberty under our form of government begins with the political insulation of those who sit in judgment over us, who have power, courage and independence to say to those who would destroy that liberty "thus far shalt thou go and no farther."

Robert S. Taylor said, in his president's address before this Association in 1900:

> "The judge is the law made manifest in the flesh. His mouth is its oracle; his hand its hand. His power is omnipresent; no one can escape him. A man could not fall from the clouds without dropping into the jurisdiction of some judge. His power is omnipotent as human power can be. All the compelling agencies of society are his to command; * * *
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> "It is with a sense of the awful majesty and power of the law that we reverence its ministers and dignify their office. From the moment a judge mounts the bench he has a place a little apart from his fellows. Above all offices which men bestow on each other, his is the one of real veneration and real confidence."[3]

If this be true, the case for judicial immunity from politics is complete and conclusive.

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[3] Taylor, Judges, (1900) Report, Indiana Bar Association, 15, 33.