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The Work of the Trial Courts in Indiana

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Before beginning reading this paper, I should like to recount a story of what happened at a banquet in Chicago in the presence of a great many lawyers and judges.

The toastmaster told a story, in which he recounted the great powers of memory of the elephant. He said, "The elephant, you know, is never supposed to forget anything."

He said once there was a boy about fifteen years old who went to a circus, and he came to the menagerie part of the circus shortly after the parade. It so happened that in the parade one of the elephants had stepped on a roofing nail, and it still remained in his foot. The boy happened to notice that nail, and to the great relief of the elephant, called it to the attention of the keeper, and the nail was removed.

Some twenty-five years later, when the boy came to be a man, he again attended the circus at which this self-same elephant was in the menagerie. He hadn't been a very great success, he had children of his own, and he could not afford to go and take them all and furnish reserved seats. So he had to sit away on the end of the circle.

Immediately before the performance they brought in the elephants, and this old bull happened to head the parade. When he got opposite this fellow who when a boy had removed the nail, he stopped and he looked over into the row of seats and he spied this fellow. He reached over with his trunk and he delicately carried him over and deposited him in a reserved seat.

Now, when I have had a very difficult problem upon which I have spent a great deal of time, and it is passed upon by the upper court correctly, and I am sustained, and I take myself too seriously, I think about this elephant story and how I happened to become a judge.

But if on a petition for rehearing or something, the case is finally reversed, I think about the self-same story in connection with the Supreme Court.

The dictionary defines the term "politics" as "the science and art of government." That is not the sense in which the term is used in this discussion. By the common and more practical use of the word, it is generally understood to mean "the process by means of which organized groups gain control of the machinery of government", and all that goes with it, and particularly the advancement of individuals in official positions. This is the sense in which the term is used in this discussion.

The chief officers concerned in judicial administration are, first: the judges; second, prosecuting attorneys, and third, sheriffs and police officers. For

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want of a more comprehensive term they will be grouped together in this paper under the one term "judiciary".

Keeping these definitions in mind, it may be said that the relation of politics and judicial administration has raised some of the most serious problems in America. Human nature being what it is and the system of selection generally being what it is, independence of the judiciary so necessary to proper administration of justice is generally an impossibility. The exceptions where our present system seems to work well are to be wondered at in the light of inherent weaknesses of such a system.

Perhaps a brief historical background would be helpful in this discussion. The Anglo-Saxon theory of government which we inherited is one of supremacy of law. That the government should be one of law applicable alike to all, rather than that the people should be subject to the whims and favors of personal rulers. This idea is carried into our framework of government and finds expression in such provisions as "that no person should suffer as to person or property except by due process of law", and, "no person should be exempt from the equal protection or operation of the law". This very theory of government calls aloud for an independent judiciary. It can be realized in no other way, and certainly not by a system of bureaucracy empowered to make, enforce and declare its own rules with the force of law.

This theory of government by law is a product of the ages. It presupposes a separate division of powers into the executive, legislative and judicial—each independent of the other.

At first English judges were appointed by the crown and held office at his pleasure. These powers of the sovereign finally came to be exercised freely and this contributed greatly to the important constitutional changes of 1688. Shortly afterward the "Act of Settlement" was enacted which provided that judges should hold office during good behavior, be paid fixed salaries, and subject to removal only by the joint address of Parliament. By these provisions the independence of the judiciary was greatly restored.

This was the condition of affairs in England at the time our nation was born. It is generally the condition in England and Canada today and accounts for the largest share of unfavorable comparison between the administration of justice in these countries and our own. In these countries the judges and prosecutors are appointed with indefinite tenures and police officers are not the subject of favors or revenge from political bosses. Each are subject to removal for incompetency or malfeasance, of course.

The same idea of independence of the judiciary existing in England at the birth of our nation was adopted by our forefathers and existed for some fifty years in this country after the birth of the republic. It is still followed to a larger extent in some of our eastern states. And then about one hundred years ago came a great Democratic revolution in America. It started in the time of Jefferson but reached its height in the time of Jackson and was personified by him.

This movement was a product of a pioneer life and consequently found expression in the west and south. It was not aimed directly at the courts, but they were carried along with it. This wave of liberal political thought tended to bring all offices more directly under the control of the electorate and operated directly and personally upon judicial officers. It was promoted and reenforced in a large measure by organized politics. This was the time when universal manhood suffrage came upon the scene. A pioneer people are naturally jealous of their powers and impatient of restraint. The political creed of such a people will and naturally did tend to the belief that everything should be decided according to the popular will. It was then that encroachment upon the judiciary resulting in the present situation had its beginning.

The first encroachment consisted in limiting the term of appointive judges to fixed terms, but leaving the manner of choosing as before. However, as the movement progressed, and politicians caught up with the procession and seized their advantages, the manner of choosing was changed also, and not only judges but prosecutors and even clerks became elective also. This was accomplished first in New York where a political machine called "The Albany Regency", much like the more recent "Tammany Hall", with which we are all familiar, held forth. The expression "To the victor belongs the spoils", sometimes attributed to Jackson and sometimes to Van Buren, who was closely connected with that organization, and very influential in those days, belongs accreditably to one William L. Marcy, also of that same organization.

This movement spread at a time when the constitutions of the more western states were being adopted and is reflected in them. Witness our own state constitution. What possible justification can there be for the selection by popular vote of such offices as State Superintendent of Public Instruction, Clerk of the Supreme Court, or any court, County Recorder, County Surveyor or any other office, the duties of which are purely administrative, to say nothing of the judiciary as originally before defined?

Thus the judiciary in America for many years safeguarded against executive or legislative interference was delivered into the bondage of politics. Thus this new powerful influence overcame the provisions of the "Act of Settlement" and to a large degree weakened the administration of law in America.

Let me not be misunderstood. I have mentioned Jefferson and Jackson, but the doctrine of their time was accepted also by the Whigs as well as the Democrats and has been as universally used by the Republicans as well. The blame cannot be laid at the door of any political party for the advantage has been used by all parties.

And now let us turn to a discussion of modern practical politics and its influence upon judicial administration. Practical politics is a business, very definite in its aims and highly efficient in its technique. Theoretically the purpose of an election is to choose between certain proposed policies of government. At times the issues are appealing enough to the electorate generally to lift the contest to a high plane, but in local elections the contest is usually upon a more or less sordid level.

The stock in trade of practical politics is votes. The business operates to gather the votes. The profits, if successful, are the offices, their salaries, patronage and perquisites. It may be thought of as a game. The most successful players are the best judges of the common weaknesses of men and the most resourceful in taking advantage of them. The offices are the prizes. Nominations and elections are rewards for services, a bid for future service and a product of organized influence. Candidates are a source of contributions. The game attracts active and popular men, not necessarily efficient—but vote getters. There is every reason why the professional politician would want to increase the number of these prizes. It is a mistaken notion that the public generally demand the right to select a myriad of unimportant public officers.

To a certain extent it may be argued that since under our form of government political parties are indispensable and party organizations are necessary, that a certain amount of the spoils system is inevitable. I suppose that is true and do not generally condemn that idea. I do, however, most sincerely condemn the system as applicable to the judiciary.

In the eyes of the politically-minded crowd, judgeships are no exception to the general rule that every office is a party asset and a political prize to be sought by political methods. The office is naturally attractive. Certain influ-

ential groups and interests are sometimes interested in the personality of the judge whose decisions might affect them. The great mass of the voters, if they thought at all, would probably say that the administration of the law ought to be subservient to the popular sentiment of the time and place, and that the judgeships should be brought nearer to the people.

In the early days one of the most effective classes of politicians was the political lawyer. He traveled about on the circuit. Trials were a general source of interest. Everybody attended them. The lawyer was a person of distinction. Oratory counted for much. The type was highly advertised. Certainly this type of lawyer would add his bit toward the movement.

It was about this time, too, that the rule was first adopted forbidding the trial court to comment on the evidence. The same with respect to charges to juries and the selection thereof. The trend of thought, which was bound to produce and encourage the politically minded lawyer, made of him not an ally of the court, but in some sense its rival. The lawyer holds a more permanent office in court than the judge.

If this be true in courts of justice, how much more aggravated is it bound to be in connection with practice before myriad boards and commissions of the present day, the members of which do not even pretend to be bound by any law except rules of their own making?

The practice of law is by nature and by tradition a purely professional calling but it has become so infected by politics that its standing has suffered immeasurably. The politically minded lawyer with the politically minded judge surely makes a dangerous combination.

The effect of politics upon the prosecuting attorney has been especially deplorable. A prosecutor should be able, impartial and fearless, and approach his tasks with the idea of justice. His success should not be measured by his percentages of convictions. It is his duty to bring out all the facts of a case, whether they may assist the prosecution or the defense. He should win no glory by a conviction or lose no honor or respect through an acquittal. Such is the ideal. Making the office political has produced the opposite results.

In smaller communities the pay is not sufficient to attract the seasoned practitioners and the office is usually held by some young lawyer politician who hopes to use it as a stepping stone to something else. In the bigger cities, he is often a political boss.

The influence of politics is reflected also in admissions to the bar. The young man who wanted a license to practice law but had little or no preparation would get scant attention or consideration from an independent judiciary. Politicians do not care about qualifications, but they do care about who wants to practice and how many friends he has that want him to. An uncritical public is indifferent. Witness the attempts in this state to change the state constitution in this regard. Along this same line in our county, there was considerable indignation recently expressed by quite a few laymen because there was opposition to the proposal to appoint a certain blind man without any qualifications whatever, a justice of the peace in order to remove him from the poor relief roll.

Such influences make it hard to raise the standard of the profession. Disbarment and contempt proceedings will continue to be rare indeed. The presence of the "shyster" and the low criminal lawyer are accounted for in large part by the influence of politicians.

Another factor having its roots in politics has aggravated the evils of judicial administration. That factor is a certain type of public press. Modern journalism, especially in the larger cities, must cater to all sorts of tastes. Competition stimulates sensationalism. The natural consequence is to play up crime and court news. Reporters are not satisfied with a plain account

of official proceedings. They demand inside stuff, advance tips, evidence, theories, clews, predictions, color, and the like. These they must have for an avid public and to compete with their rivals. At the trial they want a free hand to deal with the proceedings as a great sporting event.

Now, the prosecutor got into office by votes and he must get back again by votes, and consequently, publicity to him is highly desirable. The same can be said of the sheriff and chief of police who are largely under the orders of the prosecutor. The reporter wants the information from the prosecutor which he can give, and the prosecutor wants the publicity which the reporter can give.

Is it any wonder we have trial by newspaper?

Now, the judge could stop most of this by process of contempt, but he is a political officer, too, and publicity is of no small consequence to him. Naturally he will hesitate to alienate the press by a very free use of such power. Result: Reporters staging the show; cameras and flashlights; clicking of telegraph instruments; strutting public officials and sometimes funny pictures in the papers. When these things happen, however, it should be remembered that the individuals involved are not so much to blame as the system that is back of them.

The abuses of machine politics eventually led to attempted reforms. One of these is the primary. The old elective system for judicial officers was bad enough, but the primary made it worse. The judge must now conduct a personal campaign. The election of judicial officers is not a test of merit at all, but a test of popularity and the very attributes that tend to make an individual popular may be in direct conflict with his proper qualifications as a fit judicial officer.

Happy indeed is the individual who combines the two classes, and fortunate is the community in which he serves.

Another method sometimes used in an attempt to better conditions is to place the names of candidates on separate ballots with party designation. Such a bill was introduced in our own General Assembly some sessions ago, providing further, too, that such candidates could take no part whatever in party politics, and could not contribute to campaign funds.

This bill was jumped upon by the bosses of both parties and never got out of committee. However, the system has not worked well where tried, for it seems to have left personal politics in judicial elections as harmful as before. Special elections for judicial offices has not worked well either.

The general public are not interested enough to vote in large numbers, and the choice is consequently the result of the vote of the political machine and the selection of the bosses. Our neighboring city, Chicago, furnishes an apt example of the failure of this scheme.

Another interesting development of the doctrine of popular sovereignty is that of the initiative and referendum and the recall. This was adopted in ten of the western states and in six of the ten judges were included. And then came the Progressive Party of 1912 with the still newer doctrine of the recall of judicial decisions. No need, however, to dwell on these because they have largely gone the way of other issues of their time.

Perhaps more than enough has been said in criticism. Let me summarize by quoting Stuart H. Perry, to whose articles I am greatly in debt for many of the thoughts embodied in this discussion.

"To the influence of politics can confidently be ascribed most of the chronic evils in our system of law enforcement, and certainly the egregious conditions in large cities where these evils attain their maximum."

"In the long category might be mentioned the corruption of police methods; the degeneration of trial by jury; the abuse of such procedural steps as bail,

continuances, dismissal and habeas corpus; the perversion of probation, suspended sentences and pardons; the selection of unfit judges, prosecutors and police officers; and finally all the mischief that flows from the relations of these officers with the press. Some of these evils might occasionally arise under a non-political regime of law enforcement, but they would be sporadic and unrelated; under the existing regime they are endemic, a natural and inevitable product."

The answer is clear. Divorce politics from judicial administration. This is not an easy thing to do. For many years Indiana has been a political ridden state. We must tear out the roots of a thing that has grown for a century. Our purpose may be often misunderstood, but the task is not hopeless. The country is aroused over the failure of judicial administration, particularly on the criminal side. Reform is in the air. Magazines and newspapers have taken up the cry. The public mind will not be so averse to proper reform as might be supposed. The courts have been dragged along with the movement toward liberal political thought rather than its special target. A decided attempt in California is now in process. Perhaps no theoretically perfect way has yet been found for choosing judges, but discussion of better methods is becoming less an academic matter every day. But recounting the various methods that have been proposed is not properly within the subject assigned me, and I refrain. The danger ahead lies in palliatives and half-way measures. They tend to give a false impression of accomplishment and merely postpone the necessary steps to actual reform.

Let us hold steadfast to this principle—there can be no fundamental and durable improvement in the administration of law in America until the judiciary is restored to genuine independence. There can be no genuine independence of the judiciary until politics is divorced from judicial administration.

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