The Function and Organization of a Judicial Council

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That keen interpreter of the Greek Commonwealth, and brilliant critic of contemporary politics, Alfred Zimmern, has recently observed that "the establishment of a right relation between Knowledge and Power is the central problem of modern democracy." He was discussing the complexities of governmental organization and functions resulting from the theory, already well established in England, that the state is an instrument for securing the highest measure of well-being to those who live under its protection. While the old type of a "police state" sought to do little more than maintain order and protect property, by means of a routine administration, the new ideals of democracy are forcing governments to undertake a wide variety of economic and social services. This has made necessary the employment of skilled administrators and expert advisors of many types. For the vast and intricate activities being developed by government, the mechanism of control has become so complex that only those with ability and special training are competent either to design or operate it. In order to succeed the government must be able to command the skill of experts. Hence the conclusion of Mr. Zimmern, that the establishment of a right relation between Knowledge and Power is the central problem facing the modern state.

* An address delivered to the Indiana State Bar Association, January 19, 1934.
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The great wealth and seemingly inexhaustible resources of the United States have postponed for us the incidence of this new phase of governmental activity. While European nations have been gradually extending the sphere of state control we have continued to maintain the familiar individualism of a pioneer people to whom the frontier always offered a means of escape for those who were too heavily oppressed by the restrictions of our civilization.

But much of our wealth has vanished, our resources are diminishing and the frontier has gone. The huge industrial machine, which we thought would run forever, has stalled. The problems of society can no longer be solved by the individuals upon whom they press. Only the power of the State seems adequate for the task, and with a sudden realization of the necessity for an organized effort to correct the social and economic abuses which we have too long endured, the United States has plunged into a program for accomplishing almost in a day what England has been working upon for a generation.

The plan upon which we have embarked involves a vast overturning of conventional theories regarding the rights and duties of individuals and of various social and economic units, groups and institutions. So far as it does so, it affects all classes of society, and raises problems in which all are concerned. But it is certain to have a more specific and fundamental effect upon the legal profession. In order to bring about the readjustments which are sought, and to maintain them in proper equilibrium, it is necessary that there should be adequate procedural machinery available for the purpose. Rights without remedies lack substance. Only as ways and means can be found for enforcing rights and duties, can the new ideals for a better social order become realities. While, therefore, the question of enforcement underlies the entire problem of social and economic reconstruction, and broadly concerns the general welfare of everyone whose interests are affected by the new principles of social justice, it bears with peculiar intensity upon that social group whose professional activity is primarily devoted to the administration of justice.

Remedial law is of two types, judicial and administrative. The first is chiefly concerned with individual rights and duties relating to contract, property and personal security. This has heretofore constituted the major interest of the legal profession.
The second deals primarily with the services rendered by government and with the establishment and maintenance of socially desirable standards of individual conduct and business practice. This is a modern development based upon the idea that the state should function as an instrument for promoting social and economic well-being. Its rapidly widening scope and growing importance present vast possibilities of usefulness for the bar in protecting the public from the inevitable tyrannies of bureaucracy, provided the profession can rise to the occasion and devote its experience and skill to the development and employment of adequate procedural practices.

While the bar performs functions which are monopolistic in character, it does not follow that its services cannot be dispensed with. This is obvious in the field of administrative law, where the initiative in instituting and conducting the proceedings is lodged almost entirely in the official staff of the bureau or commission. It is only in so far as lawyers can demonstrate their ability to contribute to the efficiency of the proceedings or to the desirability of the results, that they will become an important factor in this branch of the administration of justice.

But the same is also true, to a very large extent, in the field of judicial remedies. While under our scheme of court organization, lawyers constitute a necessary part of the machinery of justice, the courts themselves may be relegated to a much less important place in the scheme of government than we have been accustomed to accord to them.

The services ordinarily rendered by the courts are not absolutely indispensable, but only relatively so. The extent of their use depends upon their speed, their convenience, the expense involved, and the degree of success with which predicted results can be actually obtained. As more and more time is consumed in efforts to obtain relief, as disturbance to the business and to the peace of mind of the litigant increases, as expenses mount and hazards multiply, other means may be found for liquidating disputes. Losses may be charged off and forgotten, settlements may be entered into, and arbitrations may be effected. Furthermore, the government may come to the aid of those who find the processes of the courts too slow, costly and uncertain, and may set up administrative offices, tribunals or bureaus, operating in a simple and summary manner, in which any inferiority in the quality of the remedy may be at least partly counter-
balanced by the ease and speed with which it can be obtained. This latter process cannot be considered a normal development of administrative law. It is rather an arbitrary transfer of jurisdiction from a judicial to an administrative tribunal. The subject matter concerns private rights, and therefore appropriately belongs within the field of judicial control. Dissatisfaction with the manner in which the courts perform, rather than doubt regarding their inherent fitness for the task, is in such cases the sole reason for depriving them of jurisdiction and turning the matter over to an administrative agency.

These methods of escape from an unsatisfactory judicial administration of the law, are neither novel in theory nor unfamiliar in practice. Fortunately, however, they do not represent the first stage of popular discontent. The English tradition in favor of recourse to the courts has been strong and persistent, and the first reaction of the public has always been to attempt to improve the judicial machinery rather than to substitute either private adjustments or administrative control. The process of revolt may therefore be considered as a cycle with three phases, the first representing a constructive but ineffectual effort to obtain better service by means of judicial remedies, the second constituting a refusal to employ the unsatisfactory facilities offered by the courts, and the third resulting in the creation of new administrative agencies for giving the relief not otherwise obtainable on reasonable terms.

This cycle has been frequently repeated, in various forms, but always with damaging effect, each recurrence leaving the courts with their field of activity contracted and their prestige impaired.

If, when the cycle begins, the needed reforms can be brought about, the occasion for the succeeding phases of revolt will never arise. The initial desire of the public is always to improve and preserve, not to destroy, the system. They wish better results from the use of familiar machinery, and it is only when efforts in this direction fail that they turn in self-defense to private devices of their own or seek by legislation to substitute the summary administrative jurisdiction of government bureaus or commissions for the ineffective processes of the courts.

It may well be questioned whether the public has not lost more than it has gained by resort to these revolutionary methods of escape from the courts. Burdens of one kind may have been merely exchanged for other burdens no less heavy. And if the
public is to seek relief from judicial procedure at its worst, by abandoning the courts, the beneficial possibilities of that procedure at its best will never be realized.

That such possibilities are very great, however, cannot be doubted.

Disillusioned creditors may write down or abandon unimpeachable claims rather than go through the prolonged agony of a law suit. But it is not at all necessary for a case to drag on to the time of trial to enable the claimant to establish his right. The existence of a defense worthy of judicial cognizance may itself be tried, immediately, summarily, and upon affidavits, and if none is found the case may end then and there, and a judgment be given at once in behalf of the creditor. In other words, a prompt and effective judicial method of collecting debts is entirely practicable. It should be available to every creditor. 2

Parties accept unfair settlements and relinquish valuable rights rather than become involved in litigation. But a settlement itself might properly become the definite objective of a judicial proceeding. Conciliation has long been a familiar field for judicial action in Scandinavian countries. 3 It has been employed in a few of the American states in small claims courts, and conciliation divisions have occasionally been established in municipal courts. 4 But professional indifference has largely prevented any serious effort to develop judicial remedies for those who prefer to settle rather than litigate.

Even apprehension resulting from insecurity and peril may be relieved by judicial action, through the use of declaratory judgments. 5

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2 Summary judgment procedure of a very effective type has long been used in England (Order 14, Rule 1). It accounts for 80% of all the judgments rendered in the King's Bench Division. See Civil Judicial Statistics, England and Wales, 1931, Table IX, p. 16. Michigan (Rule 30, Revision of 1931) and Illinois (Cahill's Rev. Stat. (1933) Ch. 110, secs. 57, 102; Ct. Rule 15) have a practice very similar to that in England. New York (Rule 113 of the Rules of Civil Practice) has gone still farther. See Summary Judgment procedure, by Edward R. Finch (1933), 19 Am. B. Assn. Jour. (Sept.) 504.


4 Justice and the Poor, by Reginald Heber Smith (1919), Ch. IX; Bull. XV Am. Jud. Soc. (1920).

5 Judicial Relief for Peril and Insecurity, by Edwin M. Borchard (1932), 45 Harv. L. Rev. 793-854; Judicial Relief for Insecurity, by the same author (1933), 33 Col. L. Rev. 648-680.
Arbitration, which largely represents a protest against professional unwillingness to provide satisfactory ways of dealing with disputed questions of fact, has accomplished little in the field of private controversies which the courts, if properly organized and operated, could not have done better, and it has raised a cloud of new problems which greatly limit its usefulness.⁶

All the special advantages claimed for arbitration, namely, the judgment of experts upon technical questions, informality of procedure, and avoidance of publicity, could be obtained by the flexible judicial remedy of a reference.⁷ At the same time the parties would thereby enjoy the enormous advantage of competent judicial supervision, a wide choice of familiar and well established remedial processes, and the security of a status resulting from the exercise of judicial power. Most of the technical difficulties encountered in the resort to arbitration would never arise in ancillary judicial proceedings, carried on under the superintending control of a judge having authority to employ all the judicial power of the court in doing complete justice between the parties.⁸

Merely transferring controversies essentially judicial to administrative tribunals is not a satisfactory solution of the problems of court organization and procedure. The proper function of such tribunals is entirely different from that of the courts. They are equipped to investigate, legislate and execute, to determine policies and to prescribe conduct; to construe and make effective laws by which the state grants licenses and privileges, supplies services, or controls social and economic relations. But

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⁶ The huge mass of decisions upon the technique of arbitration discussed in Sturges on Commercial Arbitration and Awards (1930), and the enormous variety of questions litigated, is eloquent testimony that the system is far from perfect.

⁷ Even the further advantage which Professor Isaacs believes is frequently sought, namely, escape from legalistic standards of decision and the substitution of contractual standards better suited to the particular needs of the parties, could be had under such a procedure. See, Two Views of Commercial Arbitration, by Nathan Isaacs (1927), 40 Harv. L. Rev. 929.

⁸ There is nothing inherently impractical in a system of arbitration operating entirely within, rather than outside, the jurisdiction of the court. (c. f. The Scope and Limitation of Commercial Arbitration, by Dean Harlan F. (now Mr. Justice) Stone (1923), X Proc. Acad. of Pol. Sci. of N. Y., No. 3, p. 501, 507.) Under such a system questions relating to the construction, validity, scope and effect of the arbitration agreement could be judicially determined in making or refusing an order of reference, and
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administrative bodies have neither a tradition nor a procedural equipment which enables them to assess conflicting evidence and to determine how the law should be applied to difficult and doubtful situations. Because they constantly act upon their own initiative in the interest of the public, considerations of efficiency outweigh regard for private rights. They tend to develop a routine and to become arbitrary and overbearing.

Experience with workmen's compensation boards has by no means demonstrated the superiority of administrative tribunals in dealing with industrial accidents. And yet no effort has been made to use broad powers and flexible processes of the courts in developing a really efficient method of dealing with these cases. A still more critical issue has arisen out of automobile accident litigation. Are these cases to be taken out of the courts and administered by a commission?

If the administration of justice is to meet the needs of the public, a thorough testing and overhauling of the organization and operation of courts, commissions and other cognate agencies must take place. New methods must be devised and old methods reformed or applied to new uses. Venue must be made more convenient, service of process simplified, ex parte pleadings must surrender their dominant position in litigation, greater use must be made of discovery before trial, of judicial framing of issues, and of proof by affidavit and by admissions of parties, procedural rules must be directory, not mandatory, actual prejudice must be the indispensable basis for all procedural objections, rules of evidence must be radically revised, calendars must be arranged in a way to avoid the shocking waste of time

the same would be true of the qualifications, selection and powers of the arbitrators who might constitute the board of reference; objections to the proceedings could be given prompt judicial attention and irregularities could be so dealt with, under a broad judicial discretion, as to correct or cure them or minimize their harmful effect; awards could be modified, corrected or vacated under the direction of the court without difficulty or undue delay, and they could be reduced to appropriate judgments as a matter of course or on motion, and the distinctions now drawn between common law and statutory arbitrations would no longer serve any procedural or jurisdictional purpose.


on the part of judges, lawyers and witnesses which has become familiar practice, better cooperation between judge and jury must be reestablished, a much more comprehensive system of references and auxiliary administrative machinery must be developed, the economic waste and legal risks of new trials must be reduced, the mechanism for the review of judgments must be enormously simplified and cheapened, courts must be unified and judicial personnel be subject to mobilization wherever needed, and better methods must be devised for the selection and retirement of judges.

These problems are intricate, pressing and of vital concern to society. How can they be solved?

I recur again to the suggestion with which I began, that the establishment of a right relation between Knowledge and Power is the central problem of modern democracy. In regulating the administration of justice, power is vested primarily in the legislature, secondarily in the court in so far as it makes rules of practice. Knowledge rests with the legal profession. Only lawyers are fully able to analyze and appraise procedural processes, to understand procedural problems, to identify the difficulties which obstruct, and to suggest feasible measures for relief. As judges they sit upon the courts, and as practitioners they mediate between the client on one hand and the court or commission on the other. They know what the public wants, they know what the various tribunals give, they can understand and appraise the possibilities for improvement and the conditions and limitations which must be taken into account. In short, the legal profession is the one adequate source of the Knowledge which must be brought into proper relations with Power for the salvation of justice in the State.

If the profession were to undertake this task of integration, and should organize a representative group among its members charged with responsibility for devising and proposing methods for improving the administration of justice, that group would have exactly the task which is now assigned in a score of states to the Judicial Council.

But judicial councils as actually organized do not represent the legal profession. Every judicial council act seems to have been drawn with the conscious purpose of severely restricting the representation of the dominant branch of the profession, the practicing bar.
The skeptic might say at once that any hope of substantial reform from either bench or bar would be utterly fatuous, that professional opposition to reform has always been the chief obstacle to progress, that an organization controlled by the bar would protect the interests of the public about as effectively as a committee of wolves would guard a sheepfold.

To this it might be answered that although the record of the profession has been bad, it cannot be denied that all improvements in legal procedure which have taken place during the long struggle for a better administration of justice, were due to the eventual, even though reluctant, assistance of lawyers. The entire judicial council movement was organized and promoted by them, not by the public. The profession has taken an entirely realistic attitude in the matter, for if legal machinery is to be improved at all, the task must fall upon lawyers. Only those who understand the use of a technique are competent to find and remedy its defects. The choice is not between a plan of procedural reform which relies upon lawyers and one that does not. It is a choice between professional direction of reform and the ultimate abandonment of our whole present system of contentious litigation.

The most striking feature of the judicial council statutes is the character of the personnel making up their membership. Although they were drawn by lawyers, the practitioner does not occupy a dominant place upon any council. In some of them there are no representatives whatever of the practicing bar, the whole membership consisting of judges. In others the membership is divided among judges, other public officials, laymen and practicing lawyers, but there is no state judicial council in which practicing lawyers as such predominate. All councils, it is true, are made up largely or entirely of members of the legal profession, but their qualifications in most instances are fixed with elaborate reference to the official positions in which they serve. It is as a judge of this or that particular court, or as attorney general or prosecuting attorney, or as a member of the legislature or chairman of a senate or house judiciary committee, or as a professor of law in a university faculty, rather than as a practicing lawyer, that the majority of the members of judicial councils qualify.

11 The English experience is described in “The English Struggle for Procedural Reform,” by Edson R. Sunderland (1926), 39 Harv. L. Rev. 725.
This is so remarkable and characteristic a feature of the composition of these bodies that a more detailed glance at the various statutes will be of interest. Thus the council of California consists of 11 members made up of designated judges from each of 5 courts;¹² that of Connecticut contains 4 judges representing 4 courts, 1 state's attorney, and 4 lawyers;¹³ that of Illinois has 5 members of the state senate and 5 members of the house who are members of the bar, and 5 practicing lawyers;¹⁴ that of Kansas has 3 judges representing 3 courts, the 2 chairmen of the legislative judiciary committees and 4 lawyers;¹⁵ that of Kentucky has all the judges of the Court of Appeals and all the circuit judges of the state;¹⁶ that of Maryland has 6 judges representing 4 courts and 3 lawyers;¹⁷ that of Massachusetts has 6 judges or former judges from 6 courts and not more than 4 lawyers;¹⁸ that of Michigan has 3 judges, from 3 courts, the attorney general, 1 member of the law faculty of the university, 2 laymen and 3 lawyers;¹⁹ that of New Jersey has 14 members consisting of 4 judges from 4 courts, the attorney general, the president of the State Bar Association, the 2 chairmen of the judiciary committees of the legislature, and 5 practicing lawyers;²⁰ that of North Carolina, the most recent council organized by legislative act, has 2 judges from 2 courts, the attorney general, the 2 chairmen of the judiciary committees of the legislature, 3 members of university law faculties in the state, 2 laymen and 2 practicing lawyers;²¹ that of North Dakota has all the supreme and district court judges in the state, 1 county judge, the attorney general, the dean of the state university law school, and 5 practicing lawyers;²² that of Ohio has 6 judges from 4 courts and 3 lawyers;²³ that of Oregon (subsequently dissolved by repeal of the act) had 5 judges from the various courts;²⁴ that of Rhode Island has 3 judges from 3 courts and 3 practicing

¹² Cal. Const. Art. VI, Sec. 1 a.
¹⁵ Kan. R. St., Suppl. of 1931, Sec. 20, 2201.
¹⁶ Carroll's Ky. Stat., 1930, Sec. 1126A.
¹⁸ Mass. Gen. L., 1932, Ch. 221, Sec. 34A.
¹⁹ Mich., C. L., 1929, Sec. 13525.
²¹ N. C. Code, 1931, Sec. 1461b.
²² N. D., L., 1927, Ch. 124.
²³ Throckmorton's Ohio Code, 1930, Sec. 1697.
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lawyers;25 that of Texas has 16 members consisting of 5 judges from 3 courts, the attorney general, the 2 chairmen of the Judicial committees of the legislature, 1 member of the state law school faculty, 3 laymen, and 4 practicing lawyers;26 that of Virginia has 5 judges from at least 2 courts and 4 practicing lawyers;27 that of Washington has 4 judges from 2 courts, the 2 chairmen of the judiciary committees of the legislature, 1 prosecuting attorney, and 3 practicing lawyers;28 and finally that of Wisconsin, which functions only as an advisory committee on rules made by the supreme court, has 2 judges from 2 courts, the attorney general, the revisor of statutes, the 2 chairmen of the judiciary committees of the legislature, the president of the state bar association, and 3 practicing lawyers.29

Besides these 18 councils created by legislative act, there are 3 councils created by incorporated state bars, but even these follow the same plan of refusing to give the representatives of the active bar a dominating position in the council. Thus, in Idaho the council has 5 judges and 5 practicing lawyers;30 in South Dakota it consists of 5 judges, the attorney general, the dean of the university law school and 3 practicing lawyers;31 and in Utah it has 6 judges, 1 member of the university law school faculty, 1 prosecuting attorney and 3 practicing lawyers.32

This is an amazing medley of miscellaneous qualifications for membership.

Corresponding to the variety in the character of the personnel, is an equally striking diversity in the sources from which the various members receive their appointments.33 Thus, in California all the members are appointed by the chief justice of the state. In Connecticut 4 are appointed by the chief justice and 5 by the governor. In Illinois 5 are chosen by the president of the senate, 5 by the speaker of the house and 5 by the governor. In Kansas 7 are appointed by the chief justice and 2 are members

25 R. I., L., 1927, Ch. 1038.
26 Texas, L., 1929, Ch. 309.
27 Va., Code, 1930, Sec. 6571f.
28 Wash. L., 1925, Ch. 45.
29 Wis. St., Sec. 251.18.
30 1 Idaho L. Jour. 111 (May, 1931).
32 1 Utah Bar Bull. 54 (Jan., 1932).
33 The statutes here referred to are the same as those cited above from the several states having judicial councils.
ex officio. In Kentucky all higher state judges are members ex officio. In Maryland, Massachusetts and Michigan all are appointed by the governor. In New Jersey, 4 are appointed by the chief justice, 1 by the chancellor, 5 by the president of the state bar association, and 4 are members ex officio. In North Carolina 9 are appointed by the governor and 3 are members ex officio. In North Dakota 1 is chosen by the supreme court, 5 by the executive committee of the state bar association, and all the supreme and district court judges of the state, together with the dean of the state law school, are members ex officio. In Ohio 3 are chosen by the supreme court, 2 by lower court judges, 3 are appointed by the governor, and 1 is a member ex officio. In Oregon 4 were chosen by the chief justice and 1 was a member ex officio. In Rhode Island 4 are appointed by the governor and 2 are members ex officio. In Texas 3 are chosen by the supreme court, 2 by the state bar association, 1 by the president of the state university, 3 are appointed by the governor, and 7 are members ex officio. In Virginia all are appointed by the chief justice of the highest court. In Washington 5 are chosen by the chief justice, 2 by the association of superior judges, and 3 are members ex officio. And in Wisconsin 2 are chosen by 2 judges' associations, 3 by the state bar association, and 5 are members ex officio.

Now, what is the explanation for this extraordinary diversity in the qualifications of members and sources of appointing power, and for the numerical distribution of members among the different classes of personnel?

There are two responsibilities which appear to be placed upon the judicial council. The first is express, the second is implied. The first is a very definite responsibility, for formulating and presenting to the proper authorities suitable measures for procedural reform. The second is a very indefinite responsibility, for promoting and facilitating the adoption of the measures proposed.

It is the first of these responsibilities, dealing with the formulation of better methods of procedure, which seems to invite much of the diversity found in the qualifications for membership.

There is a certain plausibility in a plan which proposes to bring together the views of those who look at the operation of the legal system from all the various angles of scholarly study and active experience. A body so organized seems to contain within itself the materials out of which can be constructed an
ideal scheme for administering the law. The judges drawn from each court see the particular problems involved in their several jurisdictions, the attorney general looks at law enforcement in its relation to the state and to public authorities, the prosecutor sees it in its relation to crime, the civil practitioner is concerned with its availability for protecting private rights, the law teacher views it in its wider implications. An almost self-evident perfection would seem to be found in the combined wisdom of all these observers.

But no body of experts can do very much to solve problems as complex as those involved in the administration of justice, by merely exchanging views and comparing experiences. A thorough understanding of any of them requires extensive research—historical, statistical and comparative, both in the library and in the field. This the members of the council can rarely do in person. Ordinarily no studies of any substantial value will be made without the employment of research workers who will devote their time to such investigations as the council may direct. The results obtained can then be interpreted and utilized by the council for the betterment of legal procedure. It is only when fortified by adequate investigation, that novel proposals can be approved with confidence.

Provision for the collection of court data is made in many judicial council acts by authorizing the council to require reports to be made to it by clerks and other officers of the courts, and general investigations are made possible in a number of states by the authority given to the council to hold public hearings, subpoena and swear witnesses and require the production of documents. But under neither of these methods is information sought from the members of the Council. They merely possess the legal authority to obtain it from others.

It follows that if the council does not and cannot supply itself with adequate data from the personal knowledge of its own members, there is no purpose in selecting those members on the basis of the diversity of the positions they happen to hold in the judi-

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34 Cal., Const. Art. VI, Sec. 1a; Conn. Gen. St., 1930, Sec. 5362; Kan. R. S., Suppl. of 1931, Sec. 20.2205; Carroll’s Ky. St., 1930, Sec. 1126A-4; Mich. C. L., 1929, Sec. 13524; N. J. L., 1931, Ch. 354; N. D., L., 1927, Ch. 124, Sec. 7; Ohio, Throckmorton’s Code, 1930, Sec. 1697-3; Texas, L., 1929, Ch. 309, Sec. 8; Wash., L., 1925, Ch. 45, Sec. 6.

35 Md. Ann. Code (Bagby) 1924, Art. 26, Sec. 77; N. D., L., 1927, Ch. 124, Sec. 6; Ohio, Throckmorton’s Code, 1930, Sec. 1697-4; Texas, L., 1929, Ch. 309, Sec. 8; Wash., L., 1925, Ch. 45, Sec. 7.
cial system. Their function is to judge not testify. They should be chosen for personal ability, liberality of mind, imagination, soundness of judgment, and the strength of their interest in making the administration of justice a satisfactory public service.

Sometimes such men will be found on the bench, sometimes in the legislature or in the attorney general's office, but more often, perhaps, they will be found among the larger group of active practitioners at the bar. Wherever found they should be chosen. The elaborate provisions in most of the judicial council acts, arbitrarily distributing the membership among the various offices, judicial and non-judicial, connected with the administration of the law, are not only useless but detrimental, and serve rather to defeat than to promote the effectiveness of the council as an agency for devising improvements in legal procedure.

North Carolina, after five years of experience with a judicial council which included all the higher judges of the state, and which accomplished substantially nothing, reorganized its council by reducing the membership to 12 and providing that 9 of them should be appointed on the basis of "interest in and competency for the study of law reform."36 This is the only statute which expressly employs the true test for membership.

The second of the responsibilities resting upon the judicial council, namely, the implied obligation to make its work effective through reasonable efforts to bring about the adoption of its proposals, is given mild support by the common provision that the council shall make an annual report to the governor or general assembly with recommendations for improving procedure, and shall suggest to the courts needed changes in their rules.37

But such reports make little impression unless they come from sources which command respect. Their prestige will be exactly equal to the prestige of those who submit them. A council with an officially distinguished personnel will create a presumption of excellence regarding whatever it may propose. This seems to

36 N. C., L., 1931, Ch. 98. Additional qualifications of the conventional type were unfortunately also prescribed.
37 Cal., Const. Art. VI, Sec. 1A; Conn. Gen. St., 1930, Sec. 5362; Ill., L., 1929, p. 134, Sec. 2; Kan. R. S., Suppl. of 1931, Sec. 20,2204; Ky. Carroll's St., 1930, Sec. 1126a-3; Md. Ann. Code (Bagby) 1924, Art. 26, Sec. 76; Mass. Gen. L., 1932, Ch. 221, Sec. 34B; Mich., C. L. 1929, Sec. 13526; N. C., Code, 1931, Sec. 1461 (E2); N. D., L., 1927, Ch. 124, Sec. 8; Ohio, Throckmorton's Code, 1930, Sec. 1697-3; R. L., L., 1927, Ch. 1038, Sec. 2; Texas, L., 1929, Ch. 309, Sec. 6; Va., Code, 1930, Sec. 6571i; Wash., L., 1925, Ch. 45, Sec. 5; Wis., St., 1930, Sec. 251.18.
be the real explanation for the majority of the qualifications for membership.

Obviously the designation of the chairmen of the two judiciary committees of the legislature as members of the judicial council, which occurs in Kansas, New Jersey, North Carolina, Texas, Washington and Wisconsin, is purely for the purpose of giving the proposals of the council a more favorable standing before the legislature. Still more definitely aimed at legislative favor for the council measures is the Illinois statute drawing two-thirds of the council from the membership of the senate and house.

Three states include laymen among the members of the council. These are Michigan, North Carolina, and Texas, the last providing that at least one layman should be a journalist. The proposed act in Mississippi, approved by the state bar, has the same provision as Texas. The purpose in adding laymen is doubtless to give the council standing with the public, and to disarm criticism, on the theory that the approval of laymen gives prima facie assurance that the proposals are not for the benefit of the profession as against the public interest.

A similar impression of fairness is sought to be given by the large number of judges placed on the councils, their judicial position clothing them with attributes of impartiality even upon matters involving their own relations to the public. And in so far as the courts exercise rule-making power, the important place on the councils occupied by judges directly contributes to the probability of the adoption of rules of court proposed.

The confidence and interest of the state bar association is sought to be enlisted in New Jersey and in Wisconsin by placing its president upon the council, and in New Jersey, North Dakota, Texas and Wisconsin by permitting the state bar association to choose several members of the council. Judge's associations in Washington and Wisconsin are perhaps expected to be favorably predisposed toward the council by the fact that they choose some of the council members in those states.

Aside from these instances of a personnel designated with a definite view of securing support for council proposals, the sources of the appointing power are so chosen as to exert a simi-
lar influence. The governor and the chief justice make most of
the appointments. Both are officers of great importance and
dignity, and presumably will make appointments in the public
interest.

And finally there is the definite purpose, evident in every
judicial council act, to keep the number of practicing lawyers
so small that they will not have a controlling voice in the council.
This can only be construed as a means of assuring the public
that the recommendations of the council will not be too deeply
tinctured by the views of the active bar.

It appears from the foregoing analysis that the miscellaneous
character of the council’s personnel and the agencies designated
for its appointment, are employed largely for two purposes—(1)
to provide the council with the data necessary for dealing with
procedural problems, and (2) to create a favorable attitude
toward its proposals and enlist possible support. Neither pur-
pose is adequately served by the means used.

So far as the first purpose is concerned, the plan is almost a
complete failure. The council cannot normally function either
as an oracle or as a research organization. It can expect to
obtain information neither through introspection and intuition
nor through the personal labors of its own members, although,
in regard to the latter, exceptions sometimes occur. It is only
through an investigating organization which it is able to direct,
or by the use of studies made by others, that the council can deal
effectively with the baffling problems of court procedure. The
primary task of the members of the council is to use data not to
collect it. Instead of a heterogeneous membership representing
many limited views, there should be a unified group of broad-
minded and progressive men, all keenly interested in the task of
reform and each able to appreciate the needs of the system as a
whole as well as to pass judgment on the technical requirements
of its various parts.

So far as the second purpose is concerned, the slight advan-
tages gained by drawing in a few legislators and laymen, capi-
talizing the non-partisan nature of the judicial office, enlisting
the languid interest of professional associations by allowing
them to place some of their own members on the council, allaying
possible suspicion by keeping the active practitioners at the
bar in a minority on the council, or placing the power of appoint-
ment in the hands of important state officers in whose fairness
the public has confidence, are entirely outweighed by the total
lack of any constituency for which the council is authorized to speak.

As commonly organized, the judicial council represents nothing but itself. By scattering its membership among many groups and interests it secures the allegiance of none. No organization sponsors its action, no social group shares its responsibility. It is an isolated unit, having neither administrative power, strong affiliations, nor institutional support. Such a body lacks the essential basis for political success. In exceptional cases these councils have accomplished notable results, owing to favorable conditions and an unusually able, forceful or distinguished personnel. But the plan of their organization is inherently weak.

As between the initial task of formulating suitable measures for reform, and the final task of securing their adoption, the former is vastly easier of accomplishment.

The collection of statistics proceeds almost automatically, once a system is adopted. Means for making special studies of particular problems are available to an extent hardly realized. Law schools, research institutes, the great charitable foundations, bar associations, legislative commissions, municipal bureaus, civic organizations, political and social science groups, and government departments, all supply excellent facilities, in addition to those which the judicial councils themselves may have the means and the desire to organize. An immense wealth of material has already been collected and published, and can be obtained by any council wishing to examine it. Its bulk and value are increasing rapidly. A National Conference of Judicial Councils has been organized largely as a clearing house of information regarding methods for improving the administration of justice.39

It is the final task which should cause concern. After definite and meritorious proposals for reform have been prepared, how can they be given operative effect? This is a political, not a legal, problem. The best seed, if it falls on stony ground, will produce nothing.

If technical knowledge is to be brought into proper relations with political power, the burden of the task must be borne by those who understand the technique. The entire legal profession shares in that knowledge. The future of the whole profession is at stake. One part cannot say to another, I have no

need of you. Bench and bar together administer the same rules, participate in the same decisions, and share equally in the praise or blame accorded by the public. The position of the judge upon the bench is no more stable than that of the lawyer at the bar. Without business for lawyers there will be no use for courts, and, it might be added, no need for law schools.

It is clear that the profession can neither let the matter drift nor leave the responsibility to others. The only effective agency for reform is one which will adequately represent the profession, and will merit and receive its united support.

A judicial council which could speak with the approval and organized support of the entire profession would occupy a position of dignity and influence. It could become a mediating agency between the public and the profession, to which complaints, criticisms and suggestions regarding the operation of the legal system could be brought by chambers of commerce, trade and business associations, civic bodies of various kinds and individual citizens. It could deal with legislative bodies frankly and openly, thereby assuming the burden, which it ought to carry, of convincing the public and its legislative representatives that the measures which it proposes are in the interest of the people as well as of the profession.

Consciousness of professional responsibility has been slow to develop in the United States. Continental Europe has far surpassed us in the professional morale of their organized bars. The Inns of Court have had a powerful influence in maintaining the high professional standards of the English bar. Bar integration is just beginning in the United States. Discipline of its members has so far been its primary and almost exclusive purpose. But if the profession is to publicly accept official responsibility for improving the quality of its personnel, there is no reason why it should decline a similar responsibility for the quality of its technique.

The recent experience of Illinois in revolutionizing its system of judicial procedure, throws an interesting light upon the comparative vitality of an independently constituted judicial council and a group representing the organized legal profession. In that
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state, not only the initiative in proposing a complete revision of
the practice, but also the entire labor of working out its details
and the responsibility for securing its adoption by the legisla-
ture, were undertaken and carried by the bar associations of the
city of Chicago and of the state of Illinois, notwithstanding
the fact that the state had a judicial council charged by the legis-
lature with the duty "to study the laws of this state in the fields
of judicial organization, criminal law, criminal procedure and
civil procedure, ascertain the defects thereof and consider the
means of remedying such defects." The council was expressly
"empowered to draft a revision of the statutes of this state, or
any part thereof, so far as relates to the several fields of law
above mentioned, and to prepare any and all forms of bills
deemed necessary to carry out its recommendations." It was
authorized "to engage such clerical, expert and other assistance
as its work may require," and it was supplied with an approipa-
tion of $5,000.00 a year.  

Professional activity in all fields is becoming a more and more
important element in modern life. There is a continuity in
professional endeavor, a tradition of professional responsibility,
and an idealism inherent in professional association, which so-
ciety can ill afford to lose. A wise public policy will conserve
and utilize this source of power. A legal profession definitely
and effectively organized to bring about a better administration
of justice would not only serve its own interests but would confer
an inestimable benefit upon society.

1925, Secs. 782-813; New Mexico, Ann. St., 1929, Secs. 9-201 to 9-212;
Washington, L., 1933, Ch. 94.  

A few acts merely mention the matter in a single sentence, declaring
that the board shall have the power to aid in the advance of the science
of jurisprudence and in the improvement of the administration of justice.
California, Gen. L., 1931, Act 591; Idaho, Code, 1932, Sec. 3-419; Nevada,
Comp. L., 1929, Sec. 592; Oklahoma, Stat., 1931, Secs. 4232.

The Mississippi act, L., 1932, Ch. 121, Sec. 24, makes it the duty of the
bar to recommend to the legislature such changes in the law as are deemed
advisable for improving the administration of justice. The Utah Act,
Rev. Stat., 1933, Sec. 6-0-19, requires the bar to make recommendations
for changes in procedure to the governor, legislature or supreme court.
The South Dakota act, L., 1931, Sec. 4232, seems to imply a desire on the
part of the legislature to obtain the views of the bar upon the judicial
system.

41 Illinois Civil Practice Act Annotated (1933) Introduction, pp. IV-V.
42 Ill., L., 1929, p. 134.