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# Improving the Administration of Justice

**Mr. Justice Tom C. Clark***

It was the words of Roscoe Pound, later Dean of the Harvard Law School, that became "the spark that kindled the white flame of progress" in court reform. They were spoken at a meeting of the American Bar Association in 1906 at St. Paul, Minnesota, in an address entitled "The Causes of Popular Dissatisfaction with the Administration of Justice". It was here that the Dean said:

> The public seldom realizes how much it is interested in maintaining the highest scientific standard in the administration of justice. There is no more certain protection against corruption, prejudice, class feeling or incompetence. Publicity will avail something. But the daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of scientific jurisprudence will escape notice, does more than any other agency for the everyday purity and efficiency of our courts.

Within six years this spark had grown to flame through the organization of the American Judicature Society in 1912. It was no other than Dean John Wigmore and Roscoe Pound who, with Herbert Harley, established it as a nationwide force in the promo-

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* An address given by Mr. Justice Tom C. Clark to the Canadian Judicature Society, September 4, 1968. Justice Clark was Attorney General of the United States from 1945 to 1949 and Associate Justice of the Supreme Court of the United States from 1949 to 1967, when he resigned upon the occasion of the appointment of his son, Ramsey Clark, as Attorney General. Justice Clark on designation of the Chief Justice sits in all federal courts, save the Supreme Court. He is Director of the Federal Judicial Center and was instrumental in setting up and operating the National College for State Trial Judges. He is Chairman of the Board of the American Judicature Society.

tion of the effective administration of justice. The principles which Pound declared were necessary if the courts and the bar were to keep the respect of the people were four, namely, take the judges out of politics; bring business techniques to court administration; develop modern rules of procedure; and, finally, create a unified court system. The Society undertook to promote these objectives.

And why was it necessary for Pound and his colleagues to organize the Society? The American Bar Association was devoting its efforts to "bread and butter" subjects rather than judicial reform. Indeed, there was no association devoting its energy to the improvement of the administration of justice exclusively, particularly in the adjective field.

Sixty-two years have passed since that day in St. Paul. The Society has grown to over 30,000 members in all of the 50 States, the insular possessions and over thirty foreign countries. And today there has been created here on Canadian soil the Canadian Judicature Society, an outgrowth of the Western Judicature Society of Edmonton, Alberta. As Chairman of the Board of the American Judicature Society, I am proud of this development and of the part that our Society had in its inspiration. We wish for you equal accomplishment in your great country.

And what is this accomplishment of which I speak? It is that the Judicature Society stands pre-eminent in the crusade for the modernization of the courts in the United States. Just as a hunter's skill is measured by the number of skins hanging on his shack, *Judicature* stands the test of numbers in its accomplishment. State after State from California to New York — Michigan to Texas — it has, through its leadership, brought about significant improvement in the reorganization of the judicial structure, the improvement of trial rules and techniques and the selection and tenure of judges. No single bar association can claim more credit in this field. With due credit to the American Bar Association in the substantive law field, and its continued good work in cooperation with other bars in judicial modernization — which has only my highest and warmest admiration — the Judicature Society's law and layman program has carried the ball in remodeling the judicial structure and in the selection and tenure of judges, and their discipline and removal. In complete cooperation with the American Bar and other law groups, state after state have adopted improvements in these areas.

Roscoe Pound was a botanist gone legal. He understood men as well as court systems and with typical wisdom he thought "men count more than machinery". As he pointed out, again and again, even with the clearest of rules, the most modern procedures and

the most efficient techniques, the key factor in the administration of justice is the judge. As Bob Leflar has so well said: "The quality of our judges is the quality of our justice". And Jake Ehrlich put it in the succinct language of the trial lawyer: "There is no guarantee of justice except the personality of the judge". The reason for this is simple, *i.e.*, the rules are not automatic or self-enforcing. Though we pride ourselves in being a government of law, we all know that men make the decisions.

The English High Courts of Justice have for centuries been the center of English justice. Those of us who are dedicated to the law cherish the invaluable traditions and enlightened jurisprudence that it has spawned. In 1882 the home of the Law Courts was moved to its new building. In the dedicatory ceremony Queen Victoria concluded her address with these words:

> The independence and learning of the judges supported by the integrity and ability of the other members of the profession of law are the chief security for the rights of the Crown and the liberties of the people.

These words are most significant. They give emphasis to the independence, learning and integrity of the judges and the Bar which are the characteristics upon which effective justice rests. This means that judges and lawyers must act on the facts and the law regardless of fear or favour from outside influences, that they be disciplined by a breadth of knowledge of legal principles and that their honesty and integrity be beyond reproach. Moreover, these attributes should not only be present but their appearance must be evident.

We who have been *at* the Courts, as well as *in* them, know that a judge's decisions are the product of the type of man he is and his philosophy of the law. For example, in a state multiple judge court where the average conviction rate on criminal charges was found to be 94 percent, one judge in the group only convicted 20 percent. And in the federal system, sentences after conviction of the same offense show a wide disparity.

What, therefore, are the qualities that make up a good judge? First, we might say what he need not be. Certainly a judge need not be vicious or corrupt to be a threat to the office. Mediocrity can pollute as badly as criminality. Mediocrity is more pervasive — it is present in every case tried by a mediocre judge. Corruption picks and chooses cases, awaiting the most vulnerable one. The victims of mediocrity are those who cannot appeal because of their penury. The appearance of justice is as important as justice itself. The bungling, incompetent, prejudiced, mediocre judge tarnishes the whole picture of the judicial process. Moreover, he cannot in practice be

removed simply because of his mediocrity. On the other hand, the corrupt or senile judge may be.

A recent survey of the judges attending the National College for State Trial Judges found the six most important qualities of a judge to be moral courage, decisiveness, integrity, patience, good health and consideration for others. The six items the judges rated of no importance were listed as past political activity, higher earnings in the practice, civic activity, administrative ability, above average scholarship and activity in professional associations. The co-ordinated committees of six bar associations in New York City named seven attributes: integrity, legal ability, above average legal experience, good health, industry, diligence and judicial temperament. And the reply of a Florida journalist was, "that man was crucified 2000 years ago". The New York Times headline opined editorially: "Recipe for Judge: Pinch of all virtues, stirred in integrity". As Professor Maurice Rosenberg stated: "On the basic qualifications of a judge, there is wide agreement... the way to measure them brings on the bafflement". He suggests that instead of a comparison on integrity, courage, *etc.*, the selection be oriented to reality. First, reject all those who do not possess the homely virtues and concentrate on the objective criteria that point up the best qualified. As the Professor points out, "there is very little difference between one man and another; but what little there is, is very important". A first step would be to develop a meaningful description of the judge's duties; then the actual performance standards of sitting judges; and finally comparisons. However, a practical set of professional qualifications can only be devised through experience. But without it, as the Professor says, the solemn and important process of selection will remain but "a noble charade".

A quick review of the judicial selection systems used throughout the world might be helpful. The Lord Chancellor in actuality makes the appointments in England. While he himself is a political officer, his appointments throughout history have been non-political. This long-time practice has become a most effective sanction. It commands and insures that only the best qualified judges be appointed. In the French system, members of the legal profession are trained for the bench. The Minister of Justice makes the appointments, but he is restricted to a panel of three candidates proposed by a judiciary commission. The French system is followed in all European countries save Russia. In South America lists of names are proposed by the Supreme Court and the appointing power is limited to this list. In Asia appointments are made on the suggestion of the Chief Justice. Thailand is to the contrary. Japan, however, uses lists

prepared by the Supreme Court. In Russia judges are subject to political control of the party, even to removal.

In the United States most of the States follow the elective method. A growing number are using the Commission Plan by which a non-partisan statutory Commission nominates a panel of three judges for each vacancy. The final choice is in the appointing power. The Commission is composed of laymen and lawyers, equally divided by vocation as well as politics. The Chairman is the Chief Justice of the State Supreme Court. In the federal system the appointive power is in the President with confirmation by the Senate. Political pressure is often exerted, particularly by Senators. The initial selection is made by the Attorney-General, who submits his list to the President. If the latter approves the nomination, it is sent to the Senate where it must be confirmed by a majority vote. In the case of United States District Judges, the Senators of the State of his residence have in effect a veto on his appointment afforded by "senatorial courtesy". This custom, however, does not extend to Appellate federal judges and Supreme Court Justices. The fact remains that appointments from the party with which the President is identified have been as high as 98.7 percent by Woodrow Wilson, and as low as 82.2 percent by Taft. During the last sixteen years federal appointments are cleared through a committee of the American Bar Association in a manner similar to your own procedure. This has proven quite helpful but is a voluntary system and rests in a delicate balance. Moreover, it does not permit any systematic recruitment, although the Attorney General could, of course, receive applicants or suggestions. The system is the reverse of the Commission plan. There the Commission proposes and the executive disposes by appointing one on the list it suggests.

Presently, the President not only proposes but also disposes. He alone selects the nominee. The ABAR Committee is relegated to appraising the quality of the nominee. Its action is not binding in the least. However, very few disapprovals by the Bar have come to light. In fact, I recall only two out of hundreds handled in this manner, which indicates the influence of the President rather than the excellence of his nominee.

An effort at reform has been on foot in the United States for years. A Bill is now pending in the Congress seeking to create a Judicial Service Commission of seven members. Three come from the Bar, two from the Judiciary [but must be in retired status] and two may be laymen. Not more than four members can be from the same political party. It is the duty of the Commission to make recommendations to the President covering any judicial vacancy.

However, the President is not limited to its recommendations, but failing to honor them he must state his reasons in the nomination made.

I believe it my duty to speak up for change. Everyone agrees that judges should be selected on merit. Politics should have no part in their selection. As Thomas Jefferson said: "Judges should always be men of learning... they should not be dependent upon any man or body of men". There can be no doubt but that judges should be appointed rather than elected. This is not to say that there should be a one man selection system. There should be some kind of check and balance over the appointive power. Otherwise, inevitably the appointees will be politically oriented. That has been our experience in the United States for almost 200 years. Change is not only good for the judiciary and the country, but it is most helpful to the appointing power. Presently he has no alibi, no excuse for not appointing an unqualified political crony who is putting on heavy political pressure, or for choosing between two equally qualified friends or supporters. However, through a Commission or other nominating process he can escape without any political damage. In fact, my experience is that for every appointment made the appointing power makes a dozen or more enemies. This hurts in politics. In my country judicial appointments have been sometimes used to take care of the faithful, the defeated, the friendly. Indeed I have heard of promises made during a political campaign and later honored by judicial appointment. Furthermore, I know of defeated politicians in our country who went on the bench and others who were election campaign managers. And even though these appointments may be good ones — and many of them have proven to be — the appearance of the judiciary is damaged and degraded. Like Caesar's wife, the judiciary must not be subject to the connotations accompanying such actions.

What is amazing is that people tolerate our present system. Some people just do not realize it; others do not care; but when they get in the toils of the law then they begin to rave. It seems obvious that the government should provide some agency to protect the courts from this. The Judicial Commission is the answer.

No method of selection, however, can guarantee that all judges will remain competent over their full term. It is, therefore, necessary to have an adequate means of disciplining and, if necessary, removing judges who violate their oath or become mentally or physically incompetent. No one should be above the law. Several states in the United States now have judicial qualification commissions or courts of the judiciary that carry out similar func-

tions. It is their duty to receive and investigate complaints against judges. If the complaint is found justified it is certified to the State Supreme Court after a hearing *in camera* by the commission. This procedure insulates the judge from injury from spurious claims. Still at the same time the public is protected.

In my country, we have become increasingly concerned also over the training of judges. This concern has brought about the creation of the National College for State Trial Judges. Planned and staffed by able judges, experts in their field, the College makes available to judges of general jurisdiction, within one to three years of their appointment, a full month's training in the intricacies of judging. Its importance has been recognized by substantial grants of money from the Kellogg and Fleishman Foundations. It has been received with great enthusiasm by members of the bench, at whose instance its facilities have been expanded from a two and one-half day seminar to the full month's instruction which is now possible.

It should not be forgotten that there are important judicial officers other than judges. All that I have said in connection with the appointment of judges applies to the appointment of magistrates. All that I have said with respect to discipline, removal and training of judges applies to discipline, removal and training of magistrates. Improved qualifications, security of tenure, removal of magistrates from all possible suggestion of political influence, are important steps in improving the administration of justice.

It is not my purpose to paint the failings of the judicial system with a heavy brush. Nor do I intend to deride the courts, criticize the judges nor tell anyone how to improve the judicial system. We have good judges — many are great ones. And so do you. But I ask you: "Is every appointment the best?" Does the system lend itself to the appearance of political preference and manipulation? If so, it should be corrected. Even the appearance of justice must be the best. If, through the system, some believe that politics is the predominating factor in the selection of judges, that is bad. We in the United States suffer from the same problem and are endeavoring to correct it. Indeed there is a mighty crusade in the United States today to correct such "appearances".

Many years ago Chief Justice Marshall said: "The greatest scourge an angry Heaven ever inflicated upon ... a people was ... a dependent judiciary". This means that no judge can be beholden to either a political party or to a politician. The judge is the only guarantee of justice. He must therefore be responsible only to God and his conscience. His independence is the bulwark of public liberty and the great security to private property. The very nature of his

service prevents his enjoyment of widespread public favor. It is not enough that we keep the doors of the courthouse open, the floors clean, the jury box, counsel table and bench polished. Without patronage, without control of the purse nor of the sword, the court's effectiveness rests solely upon the public's confidence in the judge and the purity of the court's procedures. If they have a political or other sinister appearance the integrity of the entire system is tarnished and undermined. When it starts from politics it ends with politics in the minds of the multitude, particularly the dissatisfied. We must avoid these connotations. The appearance of the judge and his staff must be above suspicion.

Every person can have a hand in this. Indeed, every person should take a hand in it. Justice is everybody's business and its good appearance is everybody's job. In the United States every one of the 32,000 members of Judicature — which includes many laymen — is taking a hand in this crusade. Through the good offices of the Canadian Judicature Society you can do the same. This means not only lawyers, but judges and laymen as well. The donning of the robe does not absolve the judge either of his duties or his responsibilities as a citizen.

The great satisfaction of my life has come from experiencing the widespread improvement of our court system and my small part in it. Whole judicial establishments have been reformed, others materially changed and still others streamlined. Judges have been transformed from caretakers *of* to crusaders *for* justice. For my part in this crusade I am grateful. As Mr. Justice Holmes once said:

> To have the chance — and take it — of doing one's share in the shaping of justice, spreads over one the hush that one used to feel when one was awaiting battle. We will reach the earthworks if we live, and if we fail we will leave our spirit in those who follow and they will not turn back... All is ready bugler — blow the charge!