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C. Severin Buschmann

Member, Indianapolis Bar

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DOES INDIANA NEED A JUDICIAL COUNCIL?

C. SEVERIN BUSCHMANN*

In view of the fact that the 76th regular session of the General Assembly of the State of Indiana is now being held, it is well to reflect upon the nature and character of the legislation to be recommended for passage. The question immediately arises as to the advisability of favoring Judicial Councils.

The purposes of a judicial council are generally to study the organization, rules and methods of procedure and practice of the judicial system of the state, the work accomplished, the results produced, and to make suggestions and recommendations for improvements either by new legislation, repeal of existing acts, or by other means. It can perform the function of a clearing house for proposed legislation and rules for the efficient administration of our legal machinery. Without such a body, legislatures are informed casually, unscientifically, and often incorrectly, upon problems of the courts. The judicial council is a means of giving them expert and disinterested advice. Recommended by leading educators, judges and members of the bar, it seems to provide the first really scientific method of improving existing conditions or remedying defects.¹

In the past few years there has been a strong trend in the various states toward favoring the adoption by the various legislatures of Judicial Councils. There is evidence that in 1929 other states will fall in line and make provisions for such a Council. Indiana at this session of the legislature, undoubtedly will be confronted with the advisability of passing such an enactment. It is timely that we consider, briefly, the merits and demerits thereof, and if the proposal appears practicable, the form of organization best adapted to our requirements.

The history of judicial councils in the United States extends over a comparatively short period of time. For some time the American Judicature Society, a body interested in the efficient

* See p. 270 for biographical note.

¹ Judge B. N. Cardozo has published a splendid article on "A Ministry of Justice" in 35 Har. L. R. 112. See also *Journal of American Judicature Society*, Vol. XII, No. 4, p. 124.

administration of justice, has been advocating judicial councils.² A revised draft of a State-wide Judicature act, originally printed by that society as Bulletin VII-A, has been republished and is available.³ In 1919 the legislature of Massachusetts created a judicature commission which investigated the system over a period of two years and in 1921 made its recommendation, and submitted a proposed draft.⁴ This report was favorably received by the bar of Massachusetts and the adoption of legislation creating such a council was recommended to the legislature. However, it was not until 1924 that the act creating the Judicial Council was adopted by the legislature.⁵

In the meantime both Ohio⁶ and Oregon had adopted acts in 1923, patterned after the Massachusetts act. Washington was the next state to adopt the judicial council, the creative act having passed the legislature in 1924.⁷ In 1925 North Carolina created a council similar to the Ohio council, but much larger and more unwieldy.⁸ In 1925, the California legislature laid the foundation for the adoption of a council by passing a resolution to amend the constitution, which amendment was approved by the voters in 1926.⁹ In 1927 the legislatures of four more states provided for judicial councils. In North Dakota the method of organization was similar to that of North Carolina in placing therein a large representation from the courts, the Attorney General, dean of the state law school and five practicing lawyers to be selected by the executive committee of the State Bar Association. It provided for a bureau of statistics and required state officials connected with civil or criminal justice to make reports.¹⁰ In addition to the objection that the membership was so large as to hamper speedy and concerted

² *Journal of American Judicature Society*, Vol. XII, No. 2, p. 49. A model judicial act was submitted by the American Judicature Society. *Ibid*, Vol. VI, p. 102.

³ *Journal of American Judicature Society*, Vol. XI, Nos. 4 and 5.

⁴ A portion of the report is published in *Journal of American Judicature Society*, Vol. XII, No. 2, pp. 50 and 51.

⁵ Mr. Robert G. Dodge's splendid address on the subject of Judicial Councils delivered at the annual meeting of the American Bar Association has been published in the *American Bar Association Journal*, Vol. XII, No. 8, p. 579.

⁶ *Journal of American Judicature Society*, Vol. VII, No. 1, p. 5.

⁷ *Journal of American Judicature Society*, Vol. IX, No. 4, p. 102.

⁸ *Journal of American Judicature Society*, Vol. IX, No. 1, p. 15.

⁹ *Journal of American Judicature Society*, Vol. IX, No. 1, pp. 16-17. See also *American Bar Association Journal*, Vol. XII, No. 12, p. 824.

¹⁰ *Journal of the American Judicature Society*, Vol. X, No. 6, p. 171.

action, the act provided for an insufficient appropriation to permit it to function. The Kansas judicial council is made up of one justice of the Supreme Court, two judges of different judicial districts, four members of the bar, and the chairmen of the judiciary committees of the legislature.¹¹ Connecticut has four members of the bench, four members of the bar and one prosecuting attorney. Its form of organization and powers are similar to those of Massachusetts.¹² In Rhode Island the council is composed of three judges and three attorneys.¹³ Recently Virginia created a judicial council and it is the eleventh state to adopt the same.¹⁴ It appears to follow the model of the Conference of Senior Circuit Court Judges of the United States Courts, and in this it differs from the judicial councils formed by the legislatures of the other states.¹⁵ Other states have considered the desirability of such a legislative step. The Bar Association of Pennsylvania adopted a report of a special committee recommending the adoption of a judicial council.¹⁶ However, undoubtedly due to lack of support, it apparently reversed itself and withdrew its endorsement, with the result that nothing was done by the legislature.¹⁷ In Missouri, the adoption of a very excellent type of council which had been adopted by the constitutional convention, failed by a narrow margin, when voted upon by the people, due to the short interval between the convention and the voting, which was too brief to afford popular education.¹⁸ In Texas a plan for a judicial council has been drafted which has received the enthusiastic support of the Association of the Judges of the Courts of Civil Appeals.¹⁹ While other states have no doubt considered the question of the adop-

¹¹ *American Bar Association Journal*, Vol. XIII, No. 5, p. 275.

¹² *Journal of American Judicature Society*, Vol. XI, No. 1, p. 8.

¹³ *Journal of American Judicature Society*, Vol. XI, No. 4, p. 117.

¹⁴ *Journal of American Judicature Society*, Vol. XII, No. 3, p. 82.

¹⁵ The Conference of Circuit Judges was created by Act of Congress of Sept. 14, 1922, c. 306, § 2, 42 Stat. 838. It appears to have been the earliest legislation upon the subject. *Journal of American Judicature Society*, Vol. VI, No. 3, p. 69, and was based upon the recommendation of Chief Justice Taft, after a study in England of its judicial system. The purposes of the conference of senior circuit judges are to make a comprehensive survey of the business of the federal courts, prepare plans for assignment and transfer of judges with a view to expediting the handling of business and other matters. *Journal of American Judicature Society*, Vol. XII, No. 2, p. 51.

¹⁶ *American Bar Association Journal*, Vol. XI, No. 8, p. 509.

¹⁷ *American Bar Association Journal*, Vol. XII, No. 8, p. 579.

¹⁸ *Journal of American Judicature Society*, Vol. XII, No. 3, p. 84.

¹⁹ *Journal of American Judicature Society*, Vol. XII, No. 2, p. 45.

tion of judicial councils, there appear to be no official publications with reference thereto.

The appropriations for the maintenance and operation of the council vary from \$250 in North Carolina to \$50,000 in California. None makes provision for compensation to members, other than for reimbursement for travel expenses and similar expenditures. Legislatures should realize the necessity of an adequate appropriation, as the same is vital to the efficient functioning of the Council.

In those states where the judicial council has been given a fair trial, results have been gratifying. The successes of the councils of Massachusetts and Connecticut have been the most outstanding. According to its third annual report, the Massachusetts Judicial Council has been openly heralded as a success.²⁰ It furnishes us with concrete evidence of its value and practicality. Matters which have been taken up sporadically by bar associations, educators and practitioners are carefully considered by a committee with a strong membership, wielding a powerful influence. Reports were made upon three special subjects upon which the legislatures requested reports, namely, first, the advisability of a verdict of eleven being sufficient to convict in criminal cases except those growing out of the killing of human beings; second, upon the suggestion of the Governor that courts should be given authority to stay executions while judicial questions are still pending, and third, as to the suggestion that the words "wilfully" and "negligently" should be added to the statute which makes it a crime to "operate a motor vehicle so that the lives or safety of the public might be endangered." In addition to passing upon the above questions, the council advised against the restoration of the earlier practice of requiring two judges to sit in murder cases in the trial court. It advised against an intermediate Appellate Court or an Appellate Division of the Superior Court. It advised against enlargement of the Supreme Judicial Court. It recommended an act to extend the rule-making power so that the courts may provide for declaratory judgments.²¹ These are only a few of the matters considered, but

²⁰ *Journal of the American Judicature Society*, Dec. 1927, p. 120; *American Bar Association Journal*, Vol. XIV, No. 1, p. 20. The third annual report is numbered "Public Document 144" and copies are obtainable at the Public Document Room in the State House. The first annual report is discussed in *American Bar Association Journal*, Vol. XII, No. 1, p. 32.

²¹ Professor Edwin M. Borchard of Yale Law School has been the leading proponent of declaratory judgment legislation, making his arguments

they are illustrative of the splendid achievements of which such a council is capable.

The Connecticut Judicial Council is likewise functioning splendidly.²² California not only has made great strides but actually has had a judicial council amendment construed by its Supreme Court.²³

The possibilities are unlimited. It has been claimed that judicial councils should have the power to establish rules for the purpose of governing procedure by rules of court;²⁴ that such a representative body is better qualified than the judges of the supreme court to perform the function. Where the Supreme Court exercises this power, then the council can give assistance by gathering information, drafting rules, acting in liaison with the members of the bar and otherwise.²⁵ It can effectuate the highly desirable power of permitting transfer of judges,²⁶ the collection and publication of statistics of the status of cases in the various courts, make recommendations to the legislature and the courts, make investigations in cases of malfeasance of officials, assist in the drafting of proposed laws, rules of court and co-operate generally with the courts and lawyers in their mutual attempts to improve our judicial systems.²⁷ It can make recommendations upon general questions, such as deficiencies in existing legislation and the advisability of changing the force of decisions out of harmony with present day morals.²⁸ It can

through legal periodicals. Indiana is one of the states which has passed a declaratory judgments act. See Acts 1927, chapter 81, p. 208.

²² 1 Conn. Bar Jour. 125; *Journal of the American Judicature Society*, Vol. XII, No. 3, p. 87.

²³ *American Bar Association Journal*, Vol. XIII, No. 4, p. 175.

²⁴ For a discussion of the exercise of the rule making power by the Supreme Court of Washington see *Journal of the American Judicature Society*, Vol. XI, No. 6, p. 187.

²⁵ *Journal of the American Judicature Society*, Vol. XII, No. 3, p. 88.

²⁶ California ran into a difficulty in the exercise of the power to transfer judges. However the objection raised can easily be overcome, and in that state the Judicial Council recommended to the Governor and the legislature that the articles of the Constitution dealing with the judiciary be reconsidered and amended. See note 23, *supra*.

²⁷ The Judicial Council of Massachusetts is making an analysis of the handling of problems arising from vehicular traffic. *Journal of the American Judicature Society*, Vol. XII, No. 1, p. 27.

²⁸ For example in the case of *Porter v. Roseman* (1905) 165 Ind. 255, our court treated money as a chattel and allowed the true owner to recover it from a person taking it in good faith for a pre-existing indebtedness.

assist courts which are endeavoring to avoid the force of "the dead hand of the common law rule" when such rules are no longer in accord with the mores of the times by recommending appropriate legislation.²⁹

One cannot consider the possibilities of judicial councils without appreciating the function of the law schools of the state. In those states in which we find successful councils, invariably the members of the law school faculties are co-operating and assisting in every possible way.³⁰ Any plan of organization of a judicial council should have in addition to members of the bench and bar, at least one man in the teaching profession. Their ability to provide for academic research is unlimited and their co-operation has proved invaluable. That the state law schools would afford invaluable assistance is unquestioned. It has given great service to the state in proposing various bills to the legislature in 1927 at the instance of the Indiana State Bar Association.³¹ To them the judicial council can turn for enlightenment on academic questions and other problems. Our laws and our system for the administration of justice can be improved in no more scientific way than by the efforts of a properly organized judicial council.

See also *Peoples State Bank v. Kellog, Receiver*, (1922) 78 Ind. App. 418, 136 N. E. 30.

²⁹ In the case of *Rosen v. United States*, 245 U. S. 467, the court said: "We conclude that the dead hand of the common law rule of 1789 should no longer be applied to such cases as we have here."

³⁰ For example, the splendid results obtained in Connecticut are due in a large measure to the efforts of such men as Professor Clark and Professor Sturges of the Yale Law School. Although the council does not have a member of the teaching profession, these men and others are rendering valuable assistance. The same is true in other schools.

³¹ Dean Paul V. McNutt, Indiana University School of Law, and the entire faculty co-operated with the State Bar Association in a splendid effort to remedy existing defects in the laws. For an excellent discussion of proposals for the improvement of the administration of criminal justice in Indiana see the article by James J. Robinson, in 2 Ind. L. J. 217.