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DEFECTS IN THE MACHINERY OF JUSTICE

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When I was invited to speak to you, I was told that the state of Colorado was in the process of considering the subject of judicial reform and that this subject might interest you. At first, I hesitated because it seemed to me that my home state and city had little to offer in the way of shining examples of progress in this field. Upon further reflection, however, it occurred to me that because of the very fact that the judicial system of our state and city leaves so much to be desired, perhaps I could be helpful if I brought to you specimens, as it were, from a laboratory which nurtures much that is archaic and bewildering in the way of judicial machinery.

In New York we have some 18 separate and distinct court systems, each of them exercising separate and, in most instances, exclusive jurisdiction over different types of causes. We have over 600 judges and 2,000 magistrates and justices of the peace. Until last year we had no central administrative office for our courts that could even collect accurate statistics. We could not even find out what the courts were costing us, although we are now told that the cost of our court system exceeds $68,000,000 per year. We have a Civil Practice Act or Code of Procedure with nearly 1600 sections followed by over 300 Rules of Practice which take up 115 pages of fine print. This does not include our separate Code of Practice for our Surrogates' Court. We have a jury calendar of personal injury cases in New York City which is about three and a half years behind.

Most of our judges are elected by popular vote except in the case of certain local courts.

At one time New York was a leader in reform in the administration of justice. Once our Code of Civil Procedure was taken as a model by other states. That was a long time ago. There has been no real change in the structure of our court system in over a hundred years, although our way of life has considerably changed between the horse-and-buggy days and today when over four and a half million automobile licenses are issued each year in New York State alone and over one hundred thirty thousand automobile accidents occur annually.

I am glad to say we are currently trying to do something about our machinery of justice. Some three years ago a special commission, known as The Temporary Commission on the Courts, was created by our Legislature to study the whole problem. It consists of four members of the Legislature and six distinguished members

of the Bar of the state. Its appointment has stirred up considerable public interest in judicial reform, particularly among the Bar and, through the Bar, in some of our citizens. The reforms which are especially needed with us include the simplification of our court structure, the establishment of a central business administration for the courts, the simplification of our Code of Procedure, and lastly—and perhaps most important—a change in our method of selecting judges.

The Temporary Commission on the Courts has done a most painstaking job and it has come forward with two major recommendations, one of which relates to the establishment of a central administration for all the courts in our state, and the other has to do with the simplification of our court structure and the reduction in the number of different types of courts. As a result of these recommendations certain legislation has been enacted and a start, although an inadequate one, has been made in establishing centralized administration. With regard to court simplification, the Commission has made sweeping recommendations which are still being revised and reconsidered but no specific proposal, either for legislative or constitutional reform to carry them out, has as yet been made.

Much to the disappointment of many of us the Commission has found no substitute for the practice which prevails in most of our courts of electing judges by popular vote. But we are determined not to let this issue die.

The objective of all of us is, of course, the same, namely, to secure a capable, honest, independent judiciary made up of men and women of intellectual and moral integrity, judicial temperament and impartial outlook—beholden to no man—or at least to as few as possible. How are we to find such a paragon?

Let us see how we do it in New York. A ballot used in New York City in the election of November, 1954, is typical of the ballot with which a voter in any district in Manhattan was confronted at that election or with which he might be confronted at almost any election.

Twenty-six vacancies in political offices from the Governorship down had to be filled. Twenty-six levers had to be pushed down on the voting machine if the citizen wanted to do his part in voting to fill these vacancies and he had to choose from some 55 candidates. The significant fact, however, is that 20 of these vacancies which had to be filled were vacancies in judicial offices. If the voter wanted to do his duty he had to vote for 20 judges and to choose them from some 35 candidates.

The fact is, of course, that most of us who entered the polling booth on Election Day knew nothing about any of the candidates on the entire ballot except those for Governor and perhaps three or four others. We pulled down the other levers in most instances because they were opposite an Eagle or a Star and many of us left the polling booth feeling rather ashamed and humiliated because

we had voted mostly as robots and not as free men exercising an intelligent, informed choice. Now you may be sure that the candidates for judicial offices were among those for whom we voted automatically.

In order to ascertain whether our personal experience in this respect was typical, some of us got together, including our Bar Association and Sheldon Elliott's Institute of Judicial Administration, and caused a poll of voters to be taken within a few days following Election Day. A well known organization, skilled in making such an investigation and study, was employed for this purpose. Three separate samplings of the voting population were made—in New York City, in the city of Buffalo, and in Cayuga County—in other words, the largest city, an upstate city, and an upstate semi-rural community. The facts found fully confirmed what we all had assumed from our own experience.

Most of the voters could not even recall the names of most of the men for whom they voted in the judicial contest. Not more than 1% of the voters interviewed in either of the three localities could remember the name of the distinguished jurist for whom they had voted and who was elected as Chief Judge of the Court of Appeals —the highest judicial office in the state. Not one person interviewed in the city of Buffalo could remember for whom he had voted as Chief Judge of the Court of Appeals.

It is interesting to note that the poll which we took showed that even in a semi-rural community where the ballot was much shorter than in New York City, only 4% of the voters interviewed could remember the name of any judicial candidate for whom they had voted.

The method of electing judges directly by popular vote is, of course, one that has great superficial appeal. It is subject to all the familiar arguments which arouse popular emotions: Should not the people be the choosers of those by whom they are to be judged? Are not the people the best qualified to select the best candidates? These and others like them are arguments which demagogic leaders always find ready at hand. The fact is, of course, that certainly in thickly populated communities these arguments for a popular election of judges are based on an entirely false premise. The premise on which the successful operation of the democratic process must always rest is that the people shall know something about the candidates for whom they are voting. Unless this is so, democracy becomes a pure mockery. Any impression that the people in such communities choose their own judges is pure delusion and any assertion to that effect is pure fantasy. The act of choosing implies a conscious act of the will. The voter does not exercise any real act of choice when he pulls down the lever over the name of a man of whom he has never even heard before he entered the polling booth and whose name he cannot remember the day after he had voted for him.

The ballot mentioned above is typical of the situation in our community. Of the candidates for the 20 vacancies in judicial offices, most of the candidates were entirely unknown to most of the

voters at the election. These candidates, chosen by the political leaders of New York City, were in most instances unknown even to most members of the Bar of the city. The most that the average voter knew about the average candidate was possibly that he had seen his photograph pasted on a billboard or in some shop window under the party emblem. Under such conditions, any thought that the people choose their own judges has no relation to reality.

To me this ballot is the best proof that you could find—by *reductio ad absurdum*—of the validity of the political philosophy which stands for the "short ballot" and "responsible government." This philosophy is based on what seems to me to be the self-evident premise that only those offices should be elective which are conspicuous enough to attract public attention. If the office is one for which the people will not take the trouble to inform themselves with regard to the candidate, they should not be asked to make the choice.

It is interesting to remember that the principle of the short ballot is one that has been sponsored by leading statesmen of both the great political parties. Woodrow Wilson headed the National Short Ballot Association. He once stated: "I believe the short ballot is the key to the whole problem of the restoration of popular government to this country."

In New York State in the roster of those who fought for this principle we find such names as Charles E. Hughes, Theodore Roosevelt, Elihu Root, Alfred E. Smith, and Henry L. Stimson. I under-

stand that the Governor of Colorado in his message to your Legislature in January, 1956, urged the adoption of the short ballot.

The logic and common sense behind the short ballot is peculiarly in point when it comes to electing judges—namely, that voters should not be asked to vote on candidates about whom they know nothing and as to whose qualifications they are not going to take the trouble to inquire. The words of Charles E. Hughes, when he was Governor of New York, in his Annual Message to the Legislature of 1910, are as apt in this situation as they were at that time. He said:

> The ends of democracy will be better attained to the extent that the attention of the voters may be focused upon comparatively few offices, the incumbents of which can be held strictly accountable for administration. This will tend to promote efficiency in public office by increasing the effectiveness of the voter and by diminishing the opportunities of political manipulators who take advantage of the multiplicity of elective offices to perfect their schemes at the public expense. I am in favor of as few elective offices as may be consistent with proper accountability to the people, and a short ballot.

The debate in New York on the principle of the short ballot came to a focus in our Constitutional Convention of 1915 where the short ballot was vigorously urged and sponsored by such statesmen as Elihu Root and Henry L. Stimson. Although the debate there revolved around the short ballot with respect to executive offices, it is striking how aptly the arguments made in favor of the short ballot apply to the situation confronting us today in the matter of selecting our judges.

Because the attention of the voters cannot be fixed on so many candidates and because they are unwilling to take the trouble to find out about them, the whole choice falls on the political leaders, the bosses, or what used to be called the "invisible government." No one has ever put it more effectively than Elihu Root speaking at the New York Constitutional Convention in 1915 when he said:

> Whether it be a president appointing a judge, or a governor appointing a superintendent of public works, whatever it may be, the officer wants to make a success, and he wants to get the man selected upon the ground of his ability to do the work. How is it about the boss? What does the boss have to do? He has to urge the appointment of a man whose appointment will consolidate his power and preserve the organization. There has been hardly a day for the last sixteen years when I have not seen those two principles come in conflict. The invisible government proceeds to build up and maintain its power by a reversal of the fundamental principle of good government, which is that men should be selected to perform the duties of the office, and to substitute the idea that men should be appointed to office for the preservation and enhancement and power of the political leader. The one, the true one, looks

> upon appointment to office with a view to the service that can be given to the public. The other, the false one, looks upon appointment to office with a view to what can be gotten out of it.

Judiciary offices are peculiarly fair game for the bosses. They are often rich in patronage and the very fact that they escape close scrutiny by the public offers a rare opportunity to the boss to run a candidate subservient to his wishes. His wishes are usually, as Mr. Root pointed out, the strengthening of his party organization and his own political power rather than the true administration of justice. If the judge becomes the boss's tool in the distribution of patronage, it receives little public attention. The appointment by a judge of his secretaries, receivers, guardians, and referees seldom comes under public examination except in connection with the exposure of a public scandal.

The people of a democracy are neither able nor willing to inform themselves about a multitude of candidates. They can and will inform themselves very thoroughly with regard to the candidates for one or two important offices. With all the media for public information now available—radio, television, commentators and the press—the people can learn about Ike Eisenhower or Adlai Stevenson running for President of the United States, or Stephen McNichols or Donald Brotzman running for Governor of the State of Colorado, but the people are not interested and will not bother to find out about Joe Doakes and Bill Jones, and maybe a dozen other names which mean nothing to them, running for judge in a particular district.

It may be that in your state and particularly in some of the less populated communities, conditions are different. It may be that the judicial candidates in such areas are known to most of the voters. The poll, which I referred to above, taken in New York indicated, however, that even in the less thickly populated districts the average voter took no interest in the judicial candidates.

You may say that people ought to take the trouble to inform themselves about all candidates, including the judicial candidates. You may say that the people ought to take the trouble to select the kind of political leaders who truly represent their will. You may say that the people ought to see to it that truly representative and informed delegates to the judicial conventions are elected at the primaries. You may say it is the people's own fault if they do not do so.

Well, unfortunately we have to take the political facts of life as we find them. We know that people do not take the trouble to find out about all the candidates for whom they are asked to vote and we know that the great majority of the people take little part in the selection of their district leaders. There is too much else in life to occupy them. Of all the candidates, the voters are least interested in the judicial candidates. The average voter does not realize that he has anything but a very remote interest in the election of a good judge. The ordinary citizen very seldom comes in direct contact with the courts. Too few of our citizens appreciate

the wisdom of the words of George Washington which are inscribed on the portico of the New York County Courthouse—that "The true administration of justice is the firmest pillar of good government."

Let us see how independent and beholden to no one a judiciary selected by popular election may be. Here again I bring you a sample from the laboratory which we maintain in New York with regard to judicial process. This sample is particularly interesting because it comes from the lips of judges themselves. The judges I refer to are the 22 judges on the City Court of the City of New York. The City Court is second in importance only to our Supreme Court with a civil jurisdiction up to $6,000 a year. These judges are elected by popular vote. They receive a salary of $22,000 a year. This year they asked the Legislature to increase their compensation to $25,000. They submitted what I think you will agree is a most interesting brief in support of this request. It is a frank and touching document. They say that they need an additional $3,000 a year because they have to go to so many hundred-dollar-a-plate dinners and because they meet so many demands "for contributions and subscriptions to various worthy causes in which . . . former helpers are active participants." It is so significant that a few paragraphs from it deserve quoting:

> . . . In order for any candidate for elective office to win in a county-wide contest, it is necessary for him to have solicited and used active aid and cooperation of many organizations and individuals: political, civic, religious, labor, fraternal, social welfare, and many others. This means that after ascending the Bench and as long as he remains on it the City Court justice, like any other justice elected on a county-wide basis, is met with demands for contributions and subscriptions to various worthy causes in which his former helpers are active participants. Frequently these are demands which he cannot refuse and where pleading lack of money is not accepted as a satisfactory excuse.
>
> One of the most conspicuous examples of this is the well-known hundred-dollar-a-plate dinner, many of which occur in each year.
>
> In one respect the need of the City Court justices to

> cooperate with former helpers is greater than that of the other State-court jurists who are elected by the majority votes of a county. The fact that a City Court justice may be contesting at some future date for a place on one of these other state courts compels him to answer many requests which otherwise he could ignore.

This statement is almost naive in its frankness. But the fact that his plight can be so frankly stated indicates that it is accepted as a matter of course that a judge, after he ascends the bench, must repay in tangible form for support which helped him get there and that he must, while still on the bench, enlist by similar means support for the future, having an eye to promotion to higher things.

If such is the pressure for money upon these judges, what must it be for favors of other kinds? Surely this pressure at times must seem intolerable. If there is one thing vital to sound government it is an independent judiciary beholden to no man and administering justice without fear or favor. A system which results in electing men to the bench encumbered with a plethora of political obligations is destructive of first principles. To our shame these political obligations have on occasion been found to run even in the direction of leaders of the underworld. When a candidate, who has just been nominated for an important judicial office, is recorded in an official wiretap as saying to a leading gangster: "I want to assure you of my loyalty for all you have done—it's undying", is it any wonder that the people's confidence in the courts is shaken?

Is it any wonder that so many clients whose cases are about to come to court believe, whether rightly or wrongly, that they will receive favorable treatment only if they hire a lawyer who happens to stand well politically with the judge? The mere fact that this view is widely held, however unwarranted, shakes the public's confidence in our courts. No democracy can survive if the people lose their respect for the law. Respect for the law cannot exist without respect for the courts which administer the law.

The frankness with which these judges point to their impulse to campaign for higher judicial office while on the bench is another interesting commentary on our system. It is interesting to contrast this, for example, to the English system. Let me quote from Lord Justice Denning of the English High Court of Appeal, who came to visit us last summer as a guest of the American Bar Association. He said in one of his addresses:

> . . . We have no system of promotion of judges in England. Once a man becomes a judge, he has nothing to gain from further promotion and does not seek it. The judges of the Supreme Court are all paid the same, no matter whether they sit to try cases at first instance or whether they sit in the Court of Appeal. . . . A man who accepts the office of a judge in England must reckon that he will stay in that position always. He has taken it on as his life work and must stand by it. This is the same whether he is a High Court judge or a County Court judge or a stipendiary magistrate. Each normally stays where he is throughout his

judicial career. The reason is that we think that the decisions of a judge should not be influenced by the hope of promotion.

The alternative to the selection of judges by popular election is, of course, to put the responsibility for their selection upon some officer elected by the people, whose office is sufficently conspicuous to have enlisted the people's interest in his candidacy and whose qualities the people have taken the trouble to appraise.

The appointive system of selecting judges is not a new and untried method. Let us not forget that the founders of our republic, in drafting the Constitution of the United States, which has served us well for all these generations, adopted the principle of the short ballot, responsible government and an appointed judiciary. The people vote for the President and Vice-President of the United States. They do not vote for the Secretary of State, the Attorney-General, the Secretary of Defense or any other member of the Cabinet. The responsibility for the selection of his team is left to the President, a candidate about whom the people are able to inform themselves. The selection of the Supreme Court of the United States and all members of the Federal judiciary is also left to the President.

The success with which the appointive federal judiciary system has in general operated speaks well for the wisdom of our forefathers who adopted it. It is also a satisfactory answer to anyone who might say that it contravenes the principle of the separation of powers of the executive and judiciary. Surely no one was more jealous of the principle of the separation of powers of these departments of government than the framers of the Constitution of the United States, yet they provided for the appointment of the Federal judges by the Chief Executive with the advice and consent of the Senate.

The appointive system prevails in one form or another and in respect to certain courts in seven states of the Union, namely, Connecticut, Delaware, New Jersey, Maine, Massachusetts, Missouri and New Hampshire. It prevails in a certain form in California. In England judges are appointed. In fact, selection of judges by popular vote is unknown, not only in any other English speaking common law country, but elsewhere except in Soviet Russia and its satellites.

I am interested to know that you in Colorado are considering a proposed plan for the selection of judges along the lines of the American Bar Association plan. It seems to me that a plan of this nature bids fair to result in the selection of judges removed as far from political considerations as any plan that has as yet been devised. Of course it is too much to expect that political affiliations can be made never to play any part in a judge's selection, whatever method be adopted. But surely it is not too much to expect that political consideration shall be a minor consideration and that some system may be found whereby qualifications for the job shall play the really important part.

In 1945, a citizens committee which included most of the lead-

ing lawyers in the City of New York was formed and adopted a similar plan and actively sponsored it. In December, 1952, The Association of the Bar of the City of New York in open meeting approved the report of one of its committees which recommended a plan of this nature for our district. A Special Committee on the Administration of Justice approved of the same plan in November, 1955, and presented it to The Temporary Commission on the Courts. But reform in this direction still meets determined opposition and our plans have not yet come to fruition.

One of the things which we have learned in New York is that the influence of the Bar alone is not sufficient to secure the enactment of the necessary legislation or constitutional amendment to bring about reform. This seems curious in view of the fact that such a large percentage of our legislators are lawyers. In order to move them to act, however, it is essential to arouse public opinion generally. The conspicuous success that was had in New Jersey in court reform was only brought about by an aroused citizenry outside of the legal profession. This is not easy to accomplish because, as I have said, the average citizen never comes into direct contact with the courts and, therefore, only vaguely senses the underlying importance of a sound judiciary to his well being.

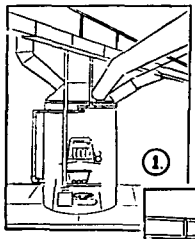
It is the members of the Bar who see the defects in our creaking machinery but the trick is how to get them cured. There are so many to whose best interest it is to keep things as they are and this includes elected judges whose influence politically is certainly not negligible. Lawyers, moreover, have an understandable reluctance not to offend judges who sit on the bench by suggesting that there is anything wrong with our method of selection.

Appreciating these facts, we have in New York within the last year or so organized a citizens committee known as the Committee for Modern Courts. This committee includes among its membership representatives of many of the leading organizations in the state including women's organizations, labor organizations, chambers of commerce, and the like. It has hardly had time to get started but I believe its influence has already been felt in certain directions and in connection with certain reforms.

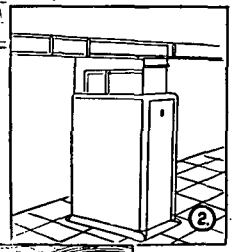
But it is to members of our profession that we must look to spark any substantial movement for reform in the administration of justice. Only we lawyers are in a position fully to detect the defects in our judicial machinery or fully to appreciate their importance. We must learn the art of gathering behind our banners the throng of all right-minded people in all walks of life. But it will always be for the members of our profession in this area of statesmanship to head the procession and to carry the torch.

TRY THIS EASY WAY TO

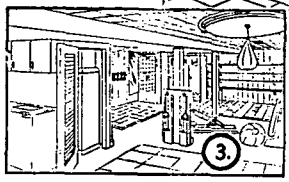
Modernize....



1. Remove your old furnace with its low-hanging, space-taking pipes.



2. Install a new compactly designed furnace in one corner of your basement.



3. Look over your basement for decorating possibilities and make it into a playroom . . . a den . . . or a work room.

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