North Dakota Law Review

Volume 26 | Number 3 Article 2

1950

The Judicial Branch of Our Government

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THE JUDICIAL BRANCH OF OUR GOVERNMENT*

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GENERALLY speaking, only the lawyer is familiar with the judicial branch of our government. Little is said in the press or heard over the radio concerning it. The issues before the legislative branch are continually debated, and the biennial elections bring to the attention of almost everyone the problems which confront our legislators. Much of the work of the executive branch comes in close contact with the people, and the lives and characters of presidents, governors, and their subordinates are fairly well known to their constituents. As a rule, judges avoid publicity. Usually they are either appointed for life or elected to long terms. Their work is unknown and they often live more or less set apart in their communities. Only when something dramatic occurs, such as the court-packing proposal of the late President Roosevelt, the Communists' trials before Judge Medina, the Hiss and Coplon trials, and the Bridges trial in San Francisco, is the searchlight of publicity thrown upon the courts and their personnel. Even then, the work of courts is not carefully considered or the place of our judicial system in government evaluated. If changes are to be made in our judicial branch, if improvements in the administration of justice are to come, if the ability and character of judges are to be bettered, if the confidence of the people in the integrity of our courts is to be preserved, the responsibility will fall largely on the members of the legal profession. In this matter personal interest, as well as public duty, should stimulate activity, for the future of the legal profession is at stake.

Those persons who are students of government will readily concede that our personal liberties are in jeopardy unless we keep distinct and independent the three branches of our government. It takes courts uninfluenced by the pressure of either the legislative or executive branches of government to preserve the liberties of freedom of religion, freedom to express personal opinion, freedom to own property and make contracts, and the right of speedy trial by jury.

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* This paper was prepared as an address delivered at the annual meeting of the University of North Dakota chapter of the Order of the Coif.

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This country has produced no more profound student of the history of the forms of government than James Madison. Upon the separation of powers he spoke with clarity and emphasis when he said: "The accumulation of all powers, legislative, executive and judicial, in the same hands, whether by one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny . . . An elective despotism is not the government we fought for but one founded on free principles in which the powers of government should be divided and balanced that no one can transcend his legal limits without being checked and restrained by others."

When dictatorship, no matter what form it takes, comes to power, and ordered liberty gives way, independent courts are the first to fall, and the courts retained are but shams for the purpose of beguiling the people into silence and inaction. No dictator could long survive an independent judiciary. If American liberty, therefore, as we know it, is to be handed down to our children, it must have the protection of a judicial branch of government confident of its prerogatives, proud of its traditions, conscious of its grave responsibility, and with courage which lifts it above partisanship and personal interest.

Courts have but one source of power, and that source is righteous judgment. Alexander Hamilton forcefully expressed this thought in these words: "The executive not only dispenses the honors, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over the sword or the purse; no direction either of the strength or the wealth of the society; and can take no active resolution whatsoever. It may truly be said to have neither force nor will, but merely judgment."

Our government in its present form was established some 150 years ago, not a long time in the history of our race but a substantial length of time in the history of governments. We believe it to be the best form of government yet devised, at least for such people as ours. I think we can point with some pride to the history of our judicial branch, especially in the matter of the preservation of our personal liberties. We have passed through periods of peace and war, prosperity and de-

pression, and though some of these periods have been of high emotional strain, our courts have retained the confidence of the people. Arthur T. Hadley, for more than 20 years president of Yale, and a student of government, made this observation in evaluating the work of our courts in the matter of guarding personal liberties: "The work of the courts in this respect, taking it as a whole, has been extremely salutary. There have, indeed, been times when the suspicion of partisanship has attached to American judicial utterances, but they have been singularly few. On the whole, federal and state courts alike have been not only a protection, but the one really efficient protection, of minority interests against oppression by the majority . . . It has more than once happened that an impatient majority has denounced these courts as instruments of partisanship. The anti-slave leaders, the soft money lenders and the labor leaders have in turn taken exception to their utterances and even ventured to impugn their motives. But I think that most intelligent men who know the history of the country will say that our courts have been the real bulwarks of American liberty; and that while Hamilton and his associates would be somewhat disappointed in the working of the machinery of legislation and administration if they could see it in its present shape, they would be filled with admiration at the work which has been accomplished by the judiciary. I believe it to be the judgment of sober-minded men that the courts have furnished the agency which has guarded us against partisan excesses and has saved the American Republic from the necessity of repeating the successive revolutionary experiences which France underwent before she could attain a stable democracy."

Thus must the courts ever stand as the guardian of the individual citizen against the encroachments of government as well as the tyranny of majorities, and should the time ever come when our courts relinquish and lay aside their grave and solemn duty, then will our people feel a justifiable terror and alarm in comparison with which economic insecurity will pale into insignificance.

When we consider the real importance of the judicial branch of our government, we realize the wisdom of eternal vigilance in the preservation of those attributes which will ever maintain its strength and secure a continuing public confidence. To this end I wish to suggest a few proposals of change not only

in our state government but also in our national government. Any change, especially in this branch of the government, is slow in coming. I do not expect to live to see all the changes which I propose consummated, nor do I intend to argue the merits of each proposal, for that would unduly lengthen this paper and perhaps defeat its purpose, which is to stimulate thought and discussion.

In our state we could do away with the justice and county courts as now constituted and place the work on the district courts. We could retain a few justices of the peace in each county to act as committing magistrates and to take care of traffic violations. Small claims should be tried to the court without a jury, and an appeal allowed only if the trial judge should certify that a question of law justified such appeal. In a few counties where we have larger cities more district judges would be required, but in many districts the judges now could carry this work.

About the only criticism which we hear of our courts is unwarranted delay. Unfortunately this criticism is justified in too many cases. This is true especially in criminal actions. From the time of the trial of a criminal case to the time of a retrial, if one is granted, there is a usual lapse of two years or more. For this delay there is no excuse. Criminal cases should be given precedence, and when appeals are taken the record should go up with dispatch and the appeal should be promptly heard and decided. Justice delayed is often justice denied. A recent report of the courts in the state of New Jersey shows what can be accomplished where courts are properly organized and where those in authority insist upon promptness and diligence. There decisions on appeal are handed down generally within 30 days after they have been submitted, with some cases taking 60 and a few 90 days.

We now have a law which permits judges to draw their full salary during the term for which they are elected even though physical disability may prevent them from performing their duties. This law would be just if we coupled with it a forced age retirement. Under this law men in older years will in good faith seek re-election, believing that they will be able to complete the work for the elected term, but will find shortly after their election a physical incapacity to proceed. This will give some people a chance to impugn the motives of the judge and accuse him of being activated by personal financial in-

terest. This will tend to undermine public confidence in the courts. It is true that the salaries of judges have always been especially meager in our state. However, the proper way is not to compensate by indirection but rather by adequate salaries and reasonable retirement. In speaking of salaries, when we consider the tax take and the buying power of the dollar, the judge's salary of today is at least 25 per cent less than it was 20 years ago. It has now reached a point where young men, unless they have outside means, cannot accept a judgeship. This branch of our government needs some young men, *i.e.*, men with 15 to 20 years experience at the bar. Conditions of financial security should be such as to attract men to the district judgeships who could reasonably expect to give 15 to 20 years of service and men to the supreme court whose expectation of service should be at least ten years.

Then too, judicial positions should never be used as a stepping stone to political office. No judge during the term for which he has been elected or appointed should be eligible to run for or receive appointment to a position in the other branches of government, either state or federal. In this regard our experience in the state of North Dakota has not been too unfavorable. However, some of our sister states have had men who have used the judicial position as a springboard to political office. If this continues, the courts cannot but lose in public confidence.

Should we not have enforced judicial retirement? We all know that we have a few notable exceptions where men past the age of 75 years retain their physical and mental vigor and carry on with efficiency to the entire satisfaction of the people. But these are exceptions, and must not exceptions be sacrificed for the public good?

Our state judges are selected by election. The Missouri mode of selection seems preferable. There judges are chosen by a nominating commission and an appointment by the governor for a short term, after which they must go before the people to determine whether they shall be retained for a longer term. The ordinary citizen knows very little about the qualifications of men who first seek judicial office. After judges have been selected and enter upon the performance of their duties, the voter is in a better position to judge qualifications. The Missouri plan should remove all political considerations in the selection of judges.

Since the adoption of the Constitution our federal judges have been appointed by the president with the advice and consent of the senate for a term during good behavior and at a salary that cannot be diminished during their term of office. We know as a matter of common knowledge that many of these appointments have been political. Men have been appointed because of assistance given in the election of a United States senator. Others who have been defeated for elective office have been appointed as a reward for party service. Others have been appointed from legislative halls, as a reward for support of certain political programs. Many have been selected from the president's cabinet who received their original appointment to the cabinet as a reward for special political effort in the election of the president. And still others have been chosen in order to satisfy the demand of some strong political faction whose continuing support seemed necessary to keep the party in power. And yet, as a whole, our federal courts have discharged their duties with credit. In 150 years there have been few impeachments and only a small number of cases where a judge has been suspected of yielding to outside influence of power or money. Men generally, upon their appointment, have put aside all partisanship and devoted themselves to the highest ideals of their profession. They have felt the dignity and grave responsibility of office and they have risen to the highest ideals of public duty. No doubt a factor in this success has been the teaching in our law schools of high professional ethical standards and judicial ethics. The very work of our profession, dealing as it does with justice and the personal liberties of men, must of necessity develop in men a strong sense of justice. Another important factor in the results thus far obtained is the provision for life appointment. This has corrected to some extent the dangers of political appointment and general lack of qualifications.

However, during recent decades there seems to be an even greater tendency to purely political appointment to judicial office. Too often the president has ignored his grave responsibilities and given way to group political pressure. Then too, we have had too many examples of appointees being indiscreet in their conduct. Not long ago the press carried the report of the Chief Justice of the Supreme Court vacationing with the President and assisting him in planning political strategy and in the preparation of political speeches. It has been often

rumored, without denial, that at least two members of the United States Supreme Court are in constant touch with the president to assist him in shaping political policies. The press carries continual references to the likelihood of a cabinet appointment from the membership of the Supreme Court, and further that one member of that court is almost certain to become a candidate for the office of either president or vice president.

We know that a few years ago one of the dominant political parties reached into the Supreme Court for a presidential nominee. This set a very dangerous precedent. We know that to become a great federal district judge, or a great federal circuit judge, or a great state supreme court judge, does not increase your chances of an appointment to the United States Supreme Court. The ethical standards of such men would prohibit them from using political pressure to gain an appointment. Would it not be a healthy condition if men appointed to the federal district court could assume, if they were diligent and successful in their work, they might be considered for other positions in the judicial system? These conditions weaken the confidence of the people in the judicial branch of our government. The time has come when we must demand a change in the manner of selection of our federal judges. Nominations should be made by a long-term nonpartisan commission, upon which the federal judiciary, the American Bar Association, the attorney-general's office and other groups should be represented. Then the advice and consent of the senate would have some meaning. Coupled with this change of selection we should have a legal provision which would make members of the federal judiciary forever ineligible to either elective or appointive positions in the other branches of government. When a man accepts appointment to the federal bench he should dedicate himself to judicial service unburdened by any future political ambitions. In this way and in this way only can we maintain courts worthy of the highest respect of the people and strong enough to support a government such as ours and still secure for the people the blessings of liberty, protecting them from the encroachments of government as well as the tyrannies of the majority.

The changes which have been suggested would assist in keeping our courts manned with men of highest caliber. Our future welfare depends upon our ability to command the

services of such men. Only to judges of integrity, ability and independence do we dare entrust the judicial branch of our government.

The sustaining of this branch of our government has greater significance than just what we might term, "good government." The very character of our people is involved. It is only under the aegis of an independent judiciary that the spirit of liberty can be kept burning. Freedom is not something we have inherited and which we can bequeath to our children. It dies when conditions are unfavorable. It lives only when valued as greater than life itself. Absolute justice cannot be obtained, but in the very pursuit of that ideal men rise to higher ground in the great march of civilization. After all, it is the character of the judicial process which will not only determine our present standards of justice but will also settle the future moral ideals of our people.