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Judicial Councils

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one, lost or denied to people of nations across the ocean, some taken by violence and some lost by negligence.

It is very easy for us to surrender or lose them here.

Our forefathers believed that "Eternal vigilance is the price of liberty" and that "God grants liberty only to those who love it and are always ready to guard and defend it." They have given you your heritage of guarantees of the constitution. They are your protection — you and your children.

In the one hundred and fifty years of its existence, and since those first ten amendments were adopted, the Constitution has been amended but eleven times. It can be amended again. But it is your duty and your right to see that the Constitution is not nullified or destroyed by legislative, judicial or executive acts.

As long as our Constitution survives with an independent Supreme Court, minorities will have equal rights before the law and complete protection against predatory majorities, mob rule or popular clamor. It was the invoking of the Bill of Rights before the Supreme Court that gave the Scottsboro boys a fair trial. An American citizen is protected by the Bill of Rights from assault or persecution for racial or religious reasons making such treatment of the Jews as is taking place in Germany impossible here.

And majorities, too, are protected by our Supreme Court against the activities of enterprising minorities whose militant activities might prevail over a negligent or thoughtless majority and bring about a destruction of our form or system of government by being contrary to its theory; or against overzealous blocs of citizens who violate the right of property ownership to attain their ends.

So, whether you are in the minority or the majority, your Constitution is your shield.

Governor Cochran says: "One hundred and fifty years ago this month, a few ordinary American words flowed from the point of a quill pen. The words became the Constitution of the United States, which Gladstone said was 'the most wonderful work ever struck off at a given time by the hand of man.'"

But it was not words and phrases which made the Constitution wonderful, and gave it life and vitality. It was the spirit of a people determined that all power shall come from the consent of the governed. The spirit gave it life, not the form.

JUDICIAL COUNCILS

At the recent meeting of the American Bar Association your Editor attended all of the meetings of the section of the Bar organization activities and was much interested in the discussion on Judicial Councils. As you all know, we have a Judicial Council in this state, which was established by Chapter 124 of the Session Laws of 1927, the announced purpose of which was "to make continuous study of the operations of the judicial system of the state, to the end that procedure may be simplified, business expedited and justice better administered." It was the concensus of opinion that while no attempt should be made to chart a permanent course of action, that it should be our immediate task to bring the judicial council movement more within the range of the activities of

the Bar Associations. In doing this there were two separate questions to be considered. 1st. What is meant by Judicial Council? Its purpose and organization. 2nd. What part can the Bar Association play in the work of such Judicial Councils?

The questions dealing with the purpose of the Judicial Council are of utmost importance. One of the chief reasons for the failure of the Judicial Council in not accomplishing all that was expected of such agencies, has been the lack of appreciation and understanding on the part of the Bar. There can be no permanent and satisfactory improvement in judicial administration without the sympathetic co-operation of the lawyers. A considerable amount of lofty idealism has been expressed concerning the Judicial Council, but to a great extent these expressions have been mere idle words, because not vitalized by a favorable attitude on the part of judges and practicing lawyers. In the first place we must recognize that there is no magic in the simple word Judicial Council. A state may have a similar agency under other names, such as Judicial Conference, Advisory Judicial Committee or the like. The important part is that a group by personnel and program is able to accomplish the task of improving Judicial Administration. It so happens that most states, like ours, have adopted the name Judicial Council.

The Judicial Councils are interested in the improvement of Judicial Administration, which in turn includes both the structure of the judicial system and the methods and procedures of operation. The matter of court organization should never be taken for granted, but should be a matter of continuous observation and the court's procedure should be continually scrutinized, so that it may be best adapted to take care of the business of the courts.

The Judicial Councils are not alone in desiring an improved judicial system. That is also the object of our Association, as it is that of most Bar Associations. However Judicial Councils differ from other agencies in their program and personnel. This difference will be briefly outlined.

The Judicial Council movement started in about the year 1923, when the first council was set up in Ohio. Since that time thirty-one states have established Councils, including Oregon and Rhode Island, which states have repealed the laws establishing their councils, and also including Illinois, whose council expired by the terms of the acts creating it. These have been established in various ways; by the Legislature in twenty-two states, by the State constitution in one, by the Supreme Court in four, and by the State Bar in four. Councils are still being organized by these various methods.

The personnel of councils varies somewhat in different states. In almost every state, judges predominate in the membership of councils. In three states, Kentucky, New Mexico and ours, North Dakota, all trial and appellate judges are included. Also in North Dakota there are five members who are lawyers and one county judge. In California the council is composed of eleven members, all of whom must be judges. This is the only state with such a requirement. In the twenty-two states which have a specified personnel 47% of the members are judges and 36% are practicing lawyers. Five states specified that one layman shall be in-

cluded. This latter provision is being advocated within recent years so that another point of view may contribute to the constructive criticism of the judicial system. The term of office of members is of various lengths, but there is considerable stability of personnel as members usually serve a full term, however in North Dakota, the Bar Association appoints five members. Under this system the selection is often at random and the membership frequently changes, which does not contribute to stability as regards the personnel of the members, while Judges are members as long as they are in office, which in this state contributes considerable to the stability of the council. The continuity of services and special selection of membership is an important feature of the council and should permit the council to carry out its unique program over a period of time.

The Judicial Council has three distinct tasks, first, -gathering the facts about the workings of the judicial system, second, -interpreting the facts and drafting the necessary rules or statutes to effect needed changes, and third, -seeing that the desired proposals become adopted either by the court or by the legislature.

The first task is one of the distinguishing features of judicial councils. Usually, and this is the case in North Dakota, it is provided that the council is established,—"For a continuous survey and study of the organization, rules, and methods of procedure and practice of the judicial system of the state."

Changes in legal procedure have been made in various ways, but chiefly they may come as the result of the activity of certain pressure groups, they may come because of the single experience of some individual, or they may result from the deliberate and long ranged study of the workings of the present system. The latter method is the only one that treats law as a science. It is fashionable in our day to be scientific. Many so called scientific techniques may not be possible in a legal system, but it is possible to use the base technique of submitting propositions to continuous observation and study, so that those propositions may be modified to fit the new data gathered and proved. "Experience is the Life of the Law", but it is not the experience of some individual legislator, or the experience of some interested group, but is the settled experience of the entire system, and that experience cannot be ascertained in any haphazard or hit or miss process.

Without a serious, substantial and prolonged study of the facts it is not surprising that changes are made by a patch work process, and that the present judicial system resembles a crazy quilt without pattern or design.

A permanent study of the judicial system does not necessarily mean that there will be frequent changes. Too frequent changes, especially if ill advised, are not a good thing. Procedure sends its roots down into the habits of the law administration group. These habits and attitudes are not easily changed. On the other hand a procedure that is subject to no change will become outmoded, and the legal system that retains it will be repudiated, and other substitutes will be provided. It is of the utmost importance therefore that changes in procedure be made along the line of a continuous plan, and that changes be made gradually, so that attitudes may

be adjusted accordingly. And the program of a judicial council furnishes just these elements of continuity and deliberation.

While Bar Associations have rendered valuable service in many states in modifying court procedure, they are usually concerned with specific objectives, and when the objectives are secured all interest is gone, and attention ceases; thus a permanent body is needed to follow up the changes and to study the operation of the change, and recommend any necessary modifications.

In the second place the program of the council calls for the interpretation of the facts, and the drafting of the necessary statutes and rules. The data gathered does not prove anything of itself, but shows trends or conditions which may require more detailed study. But such interpretation can best be made by a specially trained body which is not set up merely to get some specific thing done, but is to determine and act in case of definite need.

Most of the councils, as in North Dakota, are required to report regularly to the Governor and the State Legislature concerning the administration of the courts with any recommended changes; and a permanent body like a council can better draft such changes.

In some quarters it has been suggested the solution is to give the council quasi-rule-making power by drafting rules which, when filed in the Supreme Court, and objection is made, or change suggested within a specified time, will automatically become the rules of court. This in some cases would put the draftsmanship in the hands of a specially qualified group, and would avoid the inertia which has prevented the courts in the past from exercising the wider rule making power which they possess, however in North Dakota twenty-three of the twenty-nine members of the council are district and supreme court judges so the courts indirectly here must furnish their own magic.

The third part of the council's program is to secure the adoption of the recommended changes. The proposals of the council have no inherent capacity to get themselves enacted into law, although drawn with the utmost skill, and based upon the most thorough and irrefutable scientific research. The council through its own efforts, or with the help of some agency like the bar association must conduct a campaign to secure the adoption of the proposals by the legislature. The fruition of all the work becomes dependent upon this final maneuver, and how it should be conducted becomes a matter of supreme importance.

This gives you a short sketch of the organization and programs of judicial councils as generally set up; and to a great extent is a recital of ineffective idealism and wishful thinking, and then when we see how councils are actually functioning even this idealism becomes greatly deflated, as the accomplishments fall far short of the noble objectives sought.

To enter into any review of the present condition of judicial councils in the union would take more time and space than this article contemplates, suffice to say however that only about one third of the councils have developed any system of regularly reporting the judicial business of the state, and in addition to the lack of this reporting many of the councils have ceased to function

due to a variety of reasons chief among which is the loading of the chief functions of the councils upon state officials, and judges, already very busy with the execution of their regular duties, and then again because there is no set up by permanent appropriation to provide the machinery necessary and incident to the scientific investigation and accumulation of required data over a period of time. No attempt is here made to present the quantity of good work done by the councils in spite of such lacks, or to evaluate that service.

However the contemplation of the comparative failure of judicial councils to carry on and complete the work they were intended to do, brought home to this section of the American Bar Association the problem of the best way in which bar associations may contribute to a more successful completion of this task.

It is uncontroverted that the most of the success of judicial councils has been due to the personal interest and enthusiasm of a few individuals coupled with sufficient financial support to carry on the work. In most cases, not all, the lawyers generally have not been conscious, and I think it is true also in North Dakota, of the nature of the councils work. This proposition is primarily a lawyer's problem in the first place, and will be much more effective if supported by the approval of a majority of the lawyers. The councils may have been somewhat at fault in not bringing their work more to the attention of the bar, but in North Dakota we cannot plead that defense as five members of our council are appointed by the Executive Committee of the State Bar Association, and their activities should be a matter of discussion on bar association programs.

However in states where councils are established by agencies other than the organized bar there are only four which have committees on judicial councils, and in only sixteen states out of thirty-one have their activities been discussed on bar association programs.

We know that in this state the great task of the council would be to secure the adoption of its program by the legislature. This would need the financial assistance and sympathetic cooperation of the entire bar, which can only come after the bar has been kept adequately informed of the work and recommendations of the council. With that spirit of cooperation and correct understanding of purpose the bar can be of immeasurable service in securing the adoption of any program.

It is only when all members of the bar take more interest in these matters and are more alert to the ever present need of adjusting the judicial system to the expanding needs of society that the dream of an improved judicial administration will become a reality.

In closing would say that it was the final recommendation of this section of the American Bar Association that careful consideration be given to securing the appointment of a committee on cooperation with the judicial council wherever it is not an agency of the organized bar. Here in our state this could be very effectively handled by a committee of the five members of the judicial council appointed from our membership.