

Progress in Federal Judicial Administration*

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"The chief characteristic of the present rewriting of the law is a return to the original constitution . . . I have no doubt that this generation is like the preceding ones in that it is making some blunders, but each generation has the right to make blunders of its own rather than merely to copy those of its predecessors."

We have heard much discussion about the declining prestige of the bar, and about the proper place of the lawyer in the leadership of his community, state, and nation. But there can be no denial that it is the duty of the lawyers to lead in affairs affecting the courts of the land. The lawyer is peculiarly qualified to judge their work and to deal out criticism where it is due—and to do it with fairness.

We would have to be blind to what all others see if we lawyers failed to note that there have been disclosures of unfortunate and discreditable conditions in some of our lower federal courts which have brought them unfavorable public notice and cost them dearly in public confidence. It would be idle to deny that these conditions grew to the proportion of public scandals, not because they were unknown or unsuspected by the bar, but because the bar was complacent in its attitude and timid in its criticisms.

The composition of the federal courts makes it peculiarly difficult for abuses, if once they creep in, to be adequately dealt with, and their functions make them peculiarly susceptible to abuse. The life tenure of the judge is designed to secure for him great independence and serves an important purpose if it does that, but if a judge has a tendency to be lazy, incompetent or unethical his life tenure becomes his shelter. Impeachment is very unlikely, except in extreme cases. A bill is pending to provide a more effective discipline, but our federal system places a

heavy reliance on the character of the individual who becomes a judge.

This makes it the more deplorable that, with rare exceptions, they have always been selected as a matter of patronage. They have been looked upon by many party politicians as part of the mechanism of local party politics and treated accordingly. I hope to see the patronage motive eliminated from their selection.

Then, to each judge of the district courts there is given a certain amount of patronage. They select referees in bankruptcy, and receivers, and have to do with making their allowances. Many judges, a majority, I believe, handle such matters in a conscientious, disinterested way, but judges who have a tendency to be patronage-minded handle them as patronage. The combination of life tenure, political selection and control of judicial patronage lends itself to abuse whenever it is not handled by conscientious and high-minded men.

The lawyers are the only group in a community who really know how well judicial work is being done. The public may rightfully look to them to be the first to condemn practices or tendencies which they see departing from the best judicial traditions. They have the information to be fair and the standing to make criticism effective. Most judges covet the bar's good opinion of their workmanship and, even more, of their honor. The highest satisfaction that comes to the just judge is a secure place in the respect of his profession. If the bar is courageous but fair in its demand for high judicial standards it is not likely often to be disappointed. On the other hand, an attitude of undue tenderness or timidity merely tends to foster conditions that grow to discredit the judicial machinery.

If we encourage fearless criticism of the conditions which impair the respect and disinterestedness of the judicial office, we must also insist that it be fair and professional. The federal judiciary is overwhelmingly manned by honorable



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and high-minded men. We must not allow any contrary impression to prevail. In ability, they differ widely, but those who fail to give the best that is in them are very few, and in general, the United States is getting better judicial service than it is paying for. The pay of the federal judge in relation to state and municipal officers is, in some parts of the country, absurdly low. He has a standard to maintain much above his compensation. It is surprising that we get men in the federal courts to serve at such levels of compensation and to give the high quality of service we generally get. There is a responsibility upon the organized bar to see that this situation is corrected.

The bar associations and the organized lawyers ought to demand high standards of judicial selection. But too often the bar, when it sets up standards, sets up standards that are not acceptable to the community as a whole. Mere professional success, good paying clients and respectability are not enough. The fact that a man has participated in the active political life of his community, state, and nation does not disqualify him. Broad sympathy and understanding are more important in a judge than mere bookish learning. And bar associations would be more influential in the selection of judges if they were less inclined to narrow their support to those of merely technical competence and so-called "position at the bar."

Circuit Courts of Vital Importance

The federal circuit courts of appeals are the least understood courts in the land. I hesitate to discuss them with so many judges present. But the function of the solicitor general imposes upon him pretty constant study of these courts to determine what appeals to them will be authorized from the district courts and then what will be brought from them to the supreme court. This study of the circuit courts of appeals convinces me that the importance of those courts in our federal scheme of judicature is not appreciated by the profession. They are really courts of last resort. In most cases, a decision of those courts is, and ought to be, final. One gets to the supreme court only as a matter of grace, except in a few cases. Your client cannot invoke the supreme court merely because of his own injury by errors below, but only by a showing of public interest evidenced by novelty, or im-

portance of the question or a conflict between lower courts. Hence, the Bar should regard a circuit court of appeals as a supreme court in most cases. It is my conclusion that the bar does not so understand it.

In the past term, the supreme court received 873 petitions for certiorari, and 718 were denied. Thus, 82 percent of applications to review circuit courts of appeals decisions were denied by the supreme court, only 18 percent granted. On its face this shows great misapprehension of the finality of circuit courts of appeals decisions. It shows that the bar does not accept the concept of the supreme court as a court of law and of the circuit court of appeals as, in general, a final court of errors.

The government does accept this theory of limited resort to the supreme court. The lawyer who tries the government's case does not decide whether the supreme court will be asked to review it. Neither does the bureau or department affected. That decision is made by the solicitor general. Last year there were 362 applications, and we only authorized 69 petitions for writs of certiorari. After that weeding out, 72 percent of our applications were granted, while only 13 percent of those who applied against the government were granted. This difference is accounted for by the relative lack of observation by private counsel of the limitations on the discretionary jurisdiction of the supreme court. The court is burdened by many petitions that completely ignore those bounds. On the other hand, the government's petitions for writs are thoroughly sifted, to make certain that they apparently present a novel question of law, a conflict, or a question of public interest.

I think it is the duty of the government to present cases sometimes which it does not expect to win. We from time to time ask a review, not for the purpose of winning a case, but of getting an authoritative rule by which a particular department may guide its future conduct. Sometimes we bring up cases to challenge existing rules of law which we think are not working to the public advantage.

There have been many changes in the judge-made law of the supreme court in the past year. Not in many years have we seen so much willingness to examine the foundations of old rules and to adapt them to the conditions of our time.

Professor Ferrero explained his writing of a

Roman history, so long after the story had all been told, upon the ground that each generation has to re-write history for itself. One generation of a militaristic turn of mind would be interested chiefly in military events, while another would place emphasis upon ecclesiastical affairs, and another would scrutinize political institutions, and still another age would be interested in economics.

It is even more certain that each generation re-writes the law for itself. That this re-writing was long resisted and delayed leaves upon this particular day a larger share than usual.

The chief characteristic of the present re-writing of the law is a return to the original constitution. We are back to a commerce clause with the virility and breadth envisioned by Marshall, and back to a general welfare clause which authorizes the federal government to attack problems of nation-wide scope as was originally intended. I have no doubt that this generation is like the preceding ones in that it is making some blunders, but each generation has the right to make blunders of its own rather than merely to copy those of its predecessors.