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THE SELECTION OF FEDERAL JUDGES: THE INDEPENDENT COMMISSION APPROACH

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In an address before the American Judicature Society and the Conference of Bar Presidents in August 1966, I stated:

> A basic American tradition is the citizen's respect for law. Esteem for the courts and for the judges who preside in them is the very essence of our way of life. And undoubtedly, confidence in the institutions of law and in the men who administer them is necessary if this respect is to be maintained.[1]

This essential relationship between public respect and a rule of law is recognized in the Preamble to our Canons of Professional Ethics with the declaration that:

> In America, where the stability of Courts . . . rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be . . . so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration.[2]

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1. *Journal,* American Judicature Society, August-September 1966, Vol. 50, No. 2, at p. 55.

2. "The Canons of Professional Ethics of the American Bar Association," *Martindale-Hubbell Law Directory,* Martindale-Hubbell, Inc., Summitt, New Jersey (1966)

Apropos to this point are the words of Mr. Justice Miller in *United States v. Lee*[3] where he makes the point that:

> . . . with no patronage and no control of purse or sword, their power and influence rests solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, *and on the confidence reposed in the soundness of their decisions* and the purity of their motives. [Emphasis added.]

This same concept can be seen in the work on law reform by Arthur T. Vanderbilt when he states the need is for ". . . judges—beholden to no man, independent and honest and—equally important—believed by all men to be independent and honest . . . ." [4]

In view of this "well-documented case," we must now assess our present judicial system. Specifically, is our present system of selecting federal judges procuring the best judges available and imparting a sense of their high quality to the public in general?

Before answering this inquiry, let us pause and take a look at the present state of our federal judiciary. With such a perspective, one can better appreciate the importance of the question I have posed. The following statistics are taken from "The Federal Judicial System," a report compiled by the Senate Judiciary Subcommittee on Improvements in Judicial Machinery:[5]

1. The number of cases pending before the courts of appeals increased from 3,780 on July 1, 1964, to 4,775 on June 30, 1965.

2. Proceedings before the courts of appeals continued to rise in number during fiscal year 1965. The increase since fiscal 1961 has been 60 percent.

3. The number of civil cases commenced in U. S. district courts during fiscal year 1965 increased only slightly (a little more than 1 percent) over fiscal 1964.

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p. 171A. These Canons were adopted by the American Bar Association in 1908 and have been adopted, in whole or substantial part, in the various states by rule of court, by act of legislature, or by bar association action.

3. United States v. Lee, 106 U. S. 196, 223 (1882).

4. Vanderbilt. *The Challenge of Law Reform* (Princeton University Press 1955) at p. 11.

5. Report of the Committee on the Judiciary, United States Senate, made by its Subcommittee on Improvements in Judicial Machinery (U. S. Government Printing Office 1966).

4. Criminal cases showed a greater increase over 1964—5.4 percent.

5. At the close of the fiscal year, there were 71,941 civil cases pending before the district courts. Of these, 9.2 percent had been pending three years or more, and an additional 11.5 percent had been pending for 2 to 3 years.

6. The median time interval between issue and trial of civil cases completed during fiscal year 1965 was 11 months, but this figure was as high as 41 months in the eastern district of Pennsylvania, and 39 months in the southern district of New York. Nationally, 10 percent of the trials completed during fiscal 1965 had an interval of 37 months or more between issue and trial.

That delay in litigation represents more than a mere problem in court administration should be self-evident. Such delay goes to the very heart of our system of jurisprudence, causing undue hardship and decreasing the probability that justice will be done when the case reaches trial. Against this background of countless citizens having their basic legal rights compromised, these "cold statistics" begin to indicate the severe problem our federal judiciary is facing.

I regret that I cannot be the bearer of new statistics or the proponent of a new view of the problem which would console us by indicating that the worst has passed.

The future holds even bleaker promises for those seeking to combat the "law explosion" we are experiencing. Historically, court litigation increases in a geometric rather than an arithmetic proportion to an increase in population. In addition, our urban areas have been the major source of work for our courts.

So when we realize that next year, we will add over two million people to our population, in the next 20 years we will add as many people as now live in all 24 states west of the Mississippi River, and by 1996, our population will be growing at the rate of over 12,000 new citizens each day of the year; that 45 years ago people in cities began to outnumber people on farms, by 1960 only 11 states had more rural than urban dwellers, and that in the next 20 years we will add more people to our metropolitan areas than the entire metropolitan population of the United States in 1940; that the functions of the Federal Government are proliferating; that the industrial and financial segments of our society are increasingly complex, it is evident that there have been and will continue to be changes in the volume and character of the business of our Federal courts. Add to

this the enactment of programs such as the various Civil Rights Acts and the War on Poverty which properly administered will enable persons to achieve better economic status and become parties to cases as a new group of litigants within our increasingly Federal jurisprudence, and we see that this nation faces what might be termed a crisis if we cannot effectively remodel many of the present aspects of our Federal judiciary.

Thus, with the need for qualified judges in the Federal courts greater today than ever before due to the increasing number, diversity, and complexity of cases, we—as present and future members of the organized Bar—must be the leaders in answering the challenge to ensure that the most competent and qualified men available—and recognized as such by the public—serve in the Federal juriciary.

The Federal judicial system represents the largest and most prominent example of the appointive system: the President appointing all Federal judges with the "advice and consent" of the Senate.

Since 1952, the American Bar Association—through its committee on the Federal Judiciary—has served in an advisory capacity and gathered information on and assessed the qualifications of candidates for the Federal bench. This advisory function, while desirable and beneficial to the system, fails to guarantee continued high quality appointments.

While Presidents have usually heeded the advice of the ABA Committee, persons have been appointed to the Federal bench who were rated "not qualified." For the reasons for such action, we need only turn to the 1961 annual report of the Committee:

> Invariably, Presidents have made their judicial appointments primarily from the ranks of their own party . . . . These facts do not prove that all the appointments made in this way are bad. What they do suggest is that the best qualified judiciary is apt to be sacrificed for political purposes under an appointive scheme.[6]

6. *Annual Report of the American Bar Association*, 1961, Vol. 86 at p. 509. For an interesting contrast, note the remarks of the Lord Chancellor of England, Viscount Jowitt, whose prerogative it was to name men to the English bench:

> I am able to tell you—and no man in my country will deny it a moment—that I have never let political considerations weigh with me to the slightest degree in trying to get the fittest men.
>
> I have never appointed, incidentally, a member of my own Party. (*Journal*, American Bar Association, November 1947, Vol. 33, p. 1180. Remarks made at the Cleveland Annual Meeting in September 1947.)

Historically, statistics bear out this relationship between the party of the appointing President and the party of the appointee.

When Cleveland became President in 1884 the federal judiciary was better than 95 percent Republican. Not a single Democrat had been named to the Supreme Court since 1861. The percentages of partisan appointments by each president beginning with Cleveland is as follows:

Cleveland	97.3% Democratic
Harrison	87.9% Republican

(When he took office more than a majority of the Federal bench was Republican)

McKinley	95.7% Republican
T. Roosevelt	95.8% Republican
Taft	82.2% Republican

(When he took office the Federal bench was already predominantly Republican)

Wilson	98.7% Democratic
Harding	97.7% Republican

(When he took office the Federal bench was approximately equally divided between the parties)

Coolidge	94.1% Republican
Hoover	85.7% Republican

(When he took office the Federal bench was already predominantly Republican)

F. D. Roosevelt	97.0% Democratic

(During his term the Federal bench was for the first time predominantly Democratic)

Truman	92.2% Democratic
(When he left office the Federal bench was still more predominantly Democratic)	
Eisenhower	95.0% Republican
(When he left office the Federal bench was once again equally divided between the parties. As is well-known, President Eisenhower had publicly pledged the Democratic Congress that if the Omnibus Judgeship Bill was passed he would maintain substantially this even division)	
Kennedy	88.9% Democratic
Johnson	94.9% Democratic[7]

It should be noted that when political affiliation is an important factor in appointments to the Federal judiciary, state judges who have withdrawn from political activities during their judicial tenure are rarely considered for such appointments. More importantly, many qualified persons are precluded from serving on the Federal judiciary simply because their own party was not in control of the Presidency during their promising years. Another criticism which flows from the partisan method of appointment is cited by Senior Judge J. Earl Major of the 7th Circuit Court of Appeals:

> . . . While most judges completely divorce themselves from political activity, there appears to remain in some instances a sense of loyalty to the political party responsible for their appointment, which has been responsible for situations which not only cast serious reflection upon the judiciary, but constitute an impediment to the work of the courts. Because of this loyalty a number of judges—some of whom were wholly incapacitated, others partially—refused to retire, even though eligible to do so, because of the hope that at the next election, their own party would come into power . . . .[8]

7. See "Report of the Standing Committee on the Federal Judiciary," *Annual Report of the American Bar Association,* 1956, Vol. 81 at p. 439, as supplemented for the subsequent period.

8. "Federal Judges As Political Patronage," *Chicago Bar Record,* October 1956, Vol. 38, No. 1 at p. 9. These remarks were originally made in an address delivered at the Chicago Bar Association Annual Meeting on June 21, 1956 by the (then) Chief Judge.

Another unfavorable characteristic of the present system is the dominant role that the Justice Department—the chief litigant in the Federal courts—has in determining who shall sit on the Federal court. Taking this situation one step further, I believe all would agree that it is undesirable for any sitting judge desiring promotion to realize that his chances for such depend to any extent on how his actions on the lower court please or displease the chief litigant.

As Mr. Ben R. Miller, a member of the Board of Governors of the American Bar Association and of its Special Committee on "Nonpartisan Selection of the Federal Judiciary" has stated:

> Some method should be devised whereby the President could be timely and impartially apprised concerning the highly qualified persons available for appointments to the federal judiciary—and by other than the chief litigant before those courts.[9]

This purely appointive system also suffers from the defect that it offers no continuing permanent body to regularly and actively seek out highly qualified and talented persons for the bench and bring them to the attention of the President.

Judge Samuel Rosenman emphasized this concept in a speech he delivered before the American Judicature Society in August, 1964, when he said:

> Most of the agitation to change methods of selection comes from a desire to keep out [an unqualified] judge.
>
> But it is not enough for a system of judicial selection to aim at exclusions. It should not be designed negatively as a "keep out" system. It should be affirmative and positive—providing a means of bringing to the bench, not haphazardly or occasionally but as consistently and routinely as possible, the very best talent available and willing to serve.[10]

Who among us can disagree?

Thus, the office of the Presidency "fails to purify" the system of the undesirable features of appointment. It is evident that responsible and interested citizens must be given more than an advisory role in

9. "Federal Judicial Appointments: The Continuing Struggle for Good Judges," *Journal*, American Bar Association, February 1955, Vol. 41 at p. 128.

10. "A Better Way to Select Judges," *Journal*, American Judicature Society, October 1964, Vol. 48, No. 5, at p. 86.

this most important area. They must be given a voice that will be heeded.

If this is how the system works, what is the view that the public must hold of its operation?

A Gallup Poll[11] released on April 6th of this year revealed the dissatisfaction of Americans with the present system of selecting Federal judges. Nearly two-thirds of those asked approved a suggestion that the American Bar Association be permitted to draw up a list of approved candidates from which the President would select his nominee. Surely, one of the factors for this public disapproval is indicated by the following representative quote from the Waukegan (Illinois) *News Sun*:

> Federal judgeships have always been looked upon as juicy political plums to be distributed by the political party in control of the Presidency.[12]

While it may be possible for lawyers to be comforted by the thought that a judge, once appointed, does not feel bound or obligated to those responsible for his appointment, it is essential that there be a general acceptance and belief by the public that a judge is an impartial arbiter of disputes and interpreter of the law. No judge should have to bear the burden, at the inception of his career, of removing public suspicions as to his partisanship. An impartial method of selection would seem to offer the best solution to this problem.

What of the role played by the Department of Justice in the selection of judges? It is conceivable that the public may feel that factors extraneous to the legal merits may influence the decision of a judge when the Justice Department is a party to the suit and the Department plays such an important role in the chances of the presiding judge's promotion. Whatever the objective merits as to whether such factors influence—to any extent—the result of the case, the necessary public confidence in the judiciary should not be undermined by a suspicion, no matter how unfounded, that the "cards are stacked" against them.

These considerations and the previously mentioned Gallup Poll should give one cause to consider. Combined with an incident in October 1965, when the Senate was confronted with the choice of

11. *The Washington Post*, April 6, 1966.

12. Waukegan *News Sun*, November 18, 1961.

approving the nomination of a man who was clearly unqualified to be United States District Judge for the District of Massachusetts, they forced many persons to re-examine the system of selecting members to the Federal bench.

Last fall, in the immediate aftermath of the contested nomination, I proposed the establishment of a panel to advise the President on judicial appointments, thereby averting repetitions of this unfortunate case. Because of the importance of this whole issue of judicial reform, I have since given considerable thought to the composition and responsibilities of such an advisory body.

The result of this study is a bill which I introduced on June 30, 1966, in the United States Senate.[13] My bill would establish a seven-man Judicial Service Commission to be appointed by the President by and with the advice and consent of the Senate. At least three members would be present or former members of the American Bar Association's Committee on the Federal Judiciary, and at least two would be retired Federal judges. No more than four members would come from the same political party. The Commission would examine the qualifications of prospective appointees to the Federal bench and, whenever a vacancy occurred, would make recommendations to the President for the filling of such vacancy. My bill expresses the sense of Congress that whenever the President appoints an individual to the Federal judiciary who was not recommended by the Commission, he shall furnish the Senate with a statement explaining why he did not follow the Commission's advice.

Thus, under this plan, while a permanent body is charged with recommending qualified personnel to the President, the final responsibility for selection still rests with the Chief Executive.

My bill is based on the principle of the Missouri Plan of nominating candidates which has long been advocated by the American Judicature Society and the American Bar Association.[14] In a resolution of August 26, 1958, the American Bar Association urged in part:

> Suggestions for nominations should originate in an independent Commission established as an agency of the President, to advise with

13. S. 3579, 89th Cong., 2nd Sess. § 461 (1966); see appendix.

14. See the June 1966 issue of the American Bar Association *Journal* which contains an editorial praising the plan and its adoption and use in other states, and also an article by Richard Watson, Associate Professor of Political Science at the University of Missouri, dealing with an evaluation of the plan by the lawyers in the state. *Journal,* American Bar Association, June 1966, Vol. 52, pp. 539, 548.

> the President on appointments, and to receive from outside sources and from all segments of the organized Bar, suggestions of names of persons deemed highly qualified for appointment as judges in their respective jurisdictions.[15]

In the American Bar Association brief in support of this resolution, it was stated that this Commission would be composed of persons of "the highest personal integrity, character and objectivity," chosen by the President to serve at his pleasure, and capable of judging the qualifications of persons for judicial appointment. The Commission's function would be screening and obtaining suggestions from any source and advising the President of its recommendations.[16]

I believe most strongly in the principle of selection embodied in the Missouri Plan, rather than having any irrevocable tie with any specific provision of the bill that I have introduced. For this reason, I welcome the comments, recommendations, criticism, and assistance of the Bar, the bench, educators, interested citizens, aspiring law students, and all who desire strongly and would work actively to formulate a better plan for selecting men to the Federal judiciary than presently exists.

It is understandable that members of the Bar may be reluctant to criticize the selection method for judges before whom they practice, but we cannot afford to accept such hesitance. The judicial branch is such an important pillar in our system of government. Therefore, the members of the Bar and all who aspire to the legal profession must recognize and forthrightly exercise their duty to ensure that the administration of justice in our society is entrusted only to the most qualified available members of the Bench and Bar. This can best be achieved through a selection process which leaves no doubt in the minds of the public as to their qualifications and loyalties.

To shirk this responsibility and burden of leadership is to bring discredit upon our profession and increased uncertainty in the minds of the public about our system of judicial administration. The need for action could not be clearer.

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15. *Journal*, American Bar Association, November 1958, pp. 1109-12. Also see the *Journal*, American Judicature Society, 1957, Vol. 41, No. 2 at p. 37 and 1958, Vol. 42, No. 3, at p. 91 for favorable reaction to the introduction and passage of this resolution.

16. Brief for the American Bar Association through its Special Committee on Nonpartisan Selection of the Federal Judiciary submitted to President John F. Kennedy at p. 7. This Brief states that the Committee did not contemplate that this Commission would be a statutory one.

APPENDIX

S. 3579

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Chapter 21 of Title 28, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 461. Judicial Service Commission.

"(a) There is hereby established in the executive branch of the Government an agency to be known as the 'Judicial Service Commission,' hereinafter referred to as the 'Commission.'

"(b) The Commission shall be composed of seven members appointed by the President, by and with the advice and consent of the Senate. At least three of the members of the Commission shall be selected from among persons who are serving or shall have served as members of a committee of the American Bar Association dealing with the Federal judiciary, and at least two shall be members of the Federal judiciary who have retired from regular active service. Not more than four members shall be from the same political party. The Commission shall elect a chairman from among its members. Each member of the Commission shall be appointed for a term of three years, except that (1) the terms of the members first appointed shall expire, as designated by the President at the time of their appointments, two at the end of one year, two at the end of two years, and three at the end of three years, following the date of such appointments, and (2) a member appointed to fill a vacancy occurring before the expiration of the term of his predecessor shall serve under such appointment only for the remainder of such term.

"(c) It shall be the duty of the Commission to ascertain the qualifications of prospective appointees to positions as justices or judges of the United States and, upon the occurrence of a vacancy in any such position, to make recommendations to the President for the filling of such vacancy.

"(d) It is the sense of the Congress that in any case in which the President nominates for appointment as a justice or judge of the United States a person not recommended by the Commission for such appointment, he should transmit to the Senate at the time of such

nomination a statement of his reasons for failing to nominate a person recommended by the Commission for such appointment.

"(e) The Commission is authorized to appoint and fix the compensation of such employees, and to make such expenditures, as may be necessary to enable it to perform its functions. With the consent of the head of the department or agency concerned, the Commission may utilize, on a reimbursable basis or otherwise, the services or facilities of any department or agency in the executive branch of the Government.

"(f) Members of the Commission who are not otherwise receiving compensation as officers or employees of the United States shall be entitled to receive compensation at the rate of $ per diem while engaged in carrying out their duties as members, including traveltime. All members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons in the Government service employed intermittently, while away from their homes or regular places of business."

Sec. 2. The analysis at the beginning of chapter 21 of title 28, United States Code, is amended by adding the following new item:

"461. Judicial Service Commission."