

## THE FUTURE OF THE JUDICIAL SYSTEM

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I desire to talk to you about the judiciary, because in my opinion it is the most important of the three great branches of our form of government. I recognize at the outset there is very little I can say about the judiciary that is not already entirely familiar to you gentlemen of the law. But your very familiarity with the courts is calculated to cause you to accept them and the benefits which they bring as a matter of course, and cause you to overlook the important part which they perform in our society. I think it is well for us to stop occasionally and take stock of the rich heritage that we have in our judicial system.

For more than one hundred and fifty years the judiciary in this country has been the sanctuary for the protection of the rights of the oppressed individual. The common citizen has learned to lean on it with confidence. To him it is as a father is to a child. When he is wrongfully oppressed there instantly arises in his mind the childish instinct to say: "I will tell the courts on you." The court must not be looked upon as an instrument of punishment. It is for the protection of the individual.

The chief function of the judiciary has been the protection of the individual, not only against the lawless deprivations of other individuals, but also against the oppression and spoliation of the government itself. In fact, the real danger of oppression to the individual comes not from other individuals, but from the government itself. It was so when our government was established; for the very purpose of inserting the bill of rights in the Constitution was to protect the people from the oppression of the government itself. But we need not look to ancient history for proof of this fact. The daily press is full of reports of arbitrary action and oppression on the part of Federal bureaus. When we look at the oppressed people of Europe it is easily discernable that most of their ills are due to the oppression of the government itself. They grow out of the lack of an independent and fearless judiciary. These people lost the right to a public trial before a fair and impartial court, and soon their rights

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as individuals became submerged in and secondary to that of the state, which is but a species of slavery. Nearly a century ago Daniel Webster said: "Wherever the Temple of Justice stands and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our people." On the other hand, in no nation has liberty ever survived the destruction of an honest, independent, and fearless judiciary.

I want to talk to you about the courts because I think there is a trend in this country to destroy the independence of our judiciary and to substitute boards and bureaus in their stead, as is the practice in the totalitarian countries. Added to this, we are in one of the most critical periods in the history of our nation. The stress of the war has necessitated the temporary suspension of many of our democratic usages, and the substitution of dictatorial policies in lieu thereof. After this war is over there will come the inevitable "let-down," financial and otherwise. The people will become dissatisfied with the standards of living which will follow in the wake of the depression. There will be a continuous search for the cause of these ills. Every institution will be challenged to ascertain the cause. They will all be tested in the scales of efficiency, and those found wanting will be cast aside. The courts cannot hope to escape the test. New ideas from foreign countries will be urged upon as a panacea for our ills. If we are to preserve our judicial system, which is the backbone of our republican form of government, it would be well for us to begin now to put our house in order so that we may be prepared to repel these foreign ideas, and convince the public that ours is the best system.

Yes, we need to put our judicial system in the best possible condition, and then resell it to our own people. Whether it be well founded or not, there has grown up in this country in recent years a belief that the expense of litigation has become prohibitive; and that the long delay incident to going through our congested courts, and the uncertainty of being able to prosecute a case to a just conclusion without reversible error are insurmountable. This idea prevails not alone among average citizens, but among those in high places. The President of the United States so expressed himself in his message vetoing the Logan-Walter Bill. In this connection he said:

"Litigation has become costly beyond the ability of the average person to bear. Its technical rules of procedure are often traps for the unwary and technical rules of evidence often prevent common sense determination on information which would be regarded as adequate for any business decision. The increasing cost of competent legal advice and the necessity of relying upon lawyers to conduct court proceedings have made all laymen and most lawyers recognize the inappropriateness of entrusting routine processes of government to the outcome of never-ending lawsuits."

Now, you may say that the existing conditions were not such as to justify these charges. And I agree with you. Certainly they were not such as to justify the vetoing of this bill. But whether these charges were unfounded or not, such statements show what the people in high places are thinking of our judiciary.

The effect of such propaganda is well known to every member of this bar. It has resulted not only in the impairment of the confidence of the public in our judicial system, but in the establishment of administrative bureaus for the determination of the rights of the people.

You may not be afraid of the inroads being made by these Federal bureaus, but let us first examine the way in which they operate. They first get a law passed conferring on them certain administrative functions, and along with it there is inserted what appears to be a very innocent provision to the effect that they may hear the evidence in any controversy coming before them and find the facts; and if upon appeal to the courts there is any evidence in the record which sustains their orders, the courts are required to sustain them. Under such an arrangement they first determine the policy to be followed and the object to be accomplished by the bureau. They then send out one of their employees from the department to see if the policy is being violated; and, if so, he files a complaint and gathers evidence to support the charge. A hearing is ordered, and when the trial is called, another employee of the same department, who is in favor of the same policy and is imbued with the same spirit and is employed by the same boss, takes the bench as judge to sit in judgment in the trial of the case; while still another appointee of the same department acts as prosecuting attorney. As soon as any evidence is introduced which sustains their policy, their purpose has been accomplished; and it is then

useless for the other side to offer evidence to the contrary, for the judge already has his mind made up,—and since there is some evidence in the record to sustain the order, the courts are powerless to overturn the findings of the bureau. It is in this way that they give you what they call “a perfectly fair trial,” and deny the litigants a right to a trial by jury before an impartial judge.

I take it that it is unnecessary for me to remind you that men are not so constituted that one appointee of a board can serve as prosecuting attorney, and another, who is operating under the same orders from the same superior officer, can sit as judge in the case and render a perfectly fair and impartial judgment. Suppose the district attorney should send out one of his deputies to snoop around and investigate the way you are living or conducting your business, and such deputy should prefer charges against you, do you think you would have any chance of acquittal if you had to be tried before another appointee from the same district attorney's office?

The mischief lies in the fact that Congress has undertaken to combine in a single agency both legislative and judicial powers. When you combine in a single agency both the executive, the legislative, and the judicial powers you adopt the totalitarian form of government, and submit yourself to the rule of a dictator.

Our forefathers recognized the necessity for an independent judiciary, whereby all cases should be tried before impartial judges, who had no interest whatever in either side of the controversy. They sought to accomplish this by distinctly separating the powers of our government into three separate departments,—the legislative, the executive, and the judicial. And to make sure that no one who was in the administrative department should ever sit as judge in a case, your State Constitution, as does ours in Texas, provides that “The powers of the Government are divided into three separate departments: The Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.” (Indiana Constitution, Art. 3, Sec. 1.) The above-quoted clause of the Constitution makes it clear that no employee of a board, bureau, or any

other administrative agency should ever exercise any of the functions properly belonging to the judiciary. But I doubt if it added anything to what had already been expressed when the Constitution divided the powers of government into three separate branches. Certainly our forefathers did a very foolish thing in so carefully separating the judiciary from the other branches of the government if it had been intended that these powers could immediately be remixed and combined in a single agency.

These bureaus are either a part of the executive branch of the government or of the judicial branch. Under the Constitution they cannot be both. Nevertheless, they are performing both administrative and judicial functions. It is in this way that our republican form of government is being undermined, and there is being substituted a totalitarian system in lieu thereof.

I have thus called your attention to the inroads on the functions of the judiciary, because I wanted you to appreciate the dangers that now confront us.

It must be remembered that the excuse given for abandoning our judicial system that has made us the freest people on earth, and the substitution of the totalitarian system that has enslaved the people of Europe, is that our system is too slow and that it will not work.

It may very well be said that we are not at fault for the criticisms that are being directed at the judiciary—certainly we are not wholly at fault—but rightly or wrongly the judiciary gets the blame. All too long we have ignored complaints directed at the courts with complacency. A feeling seems to have prevailed that we were among the “untouchables.” We viewed these complaints as coming from the uninformed, who could do nothing about it; and since we were handling the business in the time-honored way there was no need for us to do anything about it. But in this we were mistaken. Although they were uninformed, and many of their complaints were ill-founded, they have succeeded in moulding a sentiment that has not only materially injured the lawyer’s business, but has threatened the very existence of some of the fundamental principles of our judicial system. It must be remembered that the judiciary “possesses neither sword nor purse; its strength is to be found in the reverence of the people for the sanctity of the law.” If the

judiciary is to maintain a high prestige it must have the confidence of the people. We must regain the confidence of the public by making our judicial processes command the respect of those who come in contact with them. We must retain the good in our system and eliminate the defects so as to command the respect of the layman.

In the first place, we must see to it that the Legislature furnishes sufficient funds to adequately man the judiciary. If additional judges are necessary in order to give litigants a prompt hearing of their controversies we must demand them. Several years ago the courts all over this country bogged down under the extraordinary case load that was cast upon them. Sometimes it took five or six years to get a case through the courts. This was true in Texas. But it was not the fault of the judiciary. Our State was young and growing. This was also true of your State. Business was good and litigation increased proportionately, but the Legislature failed to provide additional courts to take care of the increased load. If we had had an Executive Judicial Council composed of representatives of the judiciary to present our budget needs to the Legislature and thereby obtained the necessary judges we could have avoided much of the criticism that was heaped upon the judiciary at that time. If briefing clerks or other assistants are needed in order to enable the appellate courts to keep abreast of their dockets they must be supplied. It will serve no useful purpose to choke the judiciary financially in order to pay pensions, if our judicial system is to fail, and with it we lose our democratic way of life.

In this connection I remind you that the judicial system is not as expensive as some laymen seem to think. I was unable to ascertain the cost in this State, but in Texas the Legislature appropriates less than forty cents per person per year, or about the price of two packages of cigarettes, for the support of our judicial system. The average smoker in our State spends more for tobacco in two days than he pays in taxes the whole year for the support of the one institution that protects him in his liberty.

Second, we must as far as possible improve the quality of our judges. About the most expensive item that we have in our judiciary is an inexperienced or otherwise inefficient judge. Our system could undoubtedly be greatly improved

if we could induce more capable young men to come into the judiciary and to remain in it as a lifetime vocation. A good judge will undoubtedly improve with experience. A better method of selecting judges in the first instance and greater stability and tenure of office for those who enter it would doubtless induce more capable men to enter the judiciary and remain therein. Under our present system our judges are required at short and frequently recurring intervals to go before the people for renewal of their contract of employment. Any ambitious lawyer can initiate a contest and compel a judge to abandon his official duties and take to the "huskings" to campaign for re-election, even though there is no real demand for a change, but merely because the ambitious lawyer wants the judge's job. In view of the shortness of the term and the constantly impending danger of being let out, a lawyer of ability cannot afford to release his clients and surrender his practice in order to enter the judiciary. Moreover, the unseemly scramble that takes place at the polls not only deters many well qualified lawyers from accepting appointment to the bench, but gives the public the impression that a judge is a politician who obtains his preferment by political influence, and no man likes to take a cause before a judge who he thinks is subject to political influence or group pressure, or who may be tempted to count the votes on each side of the lawsuit. Furthermore, if you will ask the average intelligent voter, he will tell you that because of his lack of necessary information he does not feel qualified to select the judges for our large cities or for state-wide positions. Any system that would afford a greater stability in tenure of office, and at the same time reserve in the hands of the people the right to remove an incompetent or corrupt judge, would be an improvement.

The Richardson system that has been suggested for this State seems to have considerable merit. The system recently adopted in Missouri is likewise worthy of consideration. In that State, when a vacancy occurs in a judicial position, a state-wide nominating board, previously provided for, submits a panel of three names to the Governor from which an appointment of a successor must be made. After the appointment is made the appointee at the next regular election, and at regularly recurring intervals thereafter, must stand for re-election at the hands of the voters. He, however, has no

opponent. He runs on his record. The voters simply vote "Yes" or "No" on the issue, "Shall (the incumbent) be continued in office?" This system eliminates the hazard of a judge being harrassed by a self-appointed candidate who opposes the incumbent not because the incumbent is not doing the job well, but merely because the new candidate would like to have the position himself. At the same time it preserves in the hands of the people a means of control so that the occupant may be ousted if he refuses to obey his oath of office or otherwise fails to discharge the duties of his office.

Third, we must convince the judges that the responsibility for making the system work is theirs, and that whatever reforms are to be brought about must come from the judges themselves. I recognize that this has not always been the attitude of the judges. They seem to have adopted the "hands off" policy in this respect. In my opinion this is the wrong attitude. They know better than any one else where the system works well and where it fails. They know wherein lies the remedy. They get the blame for its failures. It is their responsibility to lead the way in bringing about any necessary reforms. Your judges, and particularly the members of the Supreme Court, can do more to bring about an improvement in your procedure in a day than the lawyers can in a whole year. The lawyers hesitate to suggest reforms when progress is not viewed with favor by the judges. I suggest that you first enlist the wholehearted support of your judges.

In order to obtain the full value of the services of our judges in bringing about needed reforms, there should be an integration of the judiciary, and the judges should be called into a conference annually for their general improvement. Perhaps I should give you the benefit of our experience in this respect in Texas. In 1941 the Supreme Court invited the appellate and trial judges to attend a meeting for this purpose, and although some of these judges had to travel over five hundred miles at their own expense, more than one hundred of the one hundred and fifty-one judges were present. The discussions were so beneficial, and the judges were so well pleased with the opportunity of having a face to face discussion of their problems with the members of the appellate courts and their fellow trial judges, that they



requested the Supreme Court to call them together annually thereafter for the same purpose. It has now become an annual affair. It is surprising that we did not get around to this sooner. Under the judicial system of most States every judge stands alone and every court is an institution unto itself, wholly independent of all others, save and except for the power of reversal by some higher court. This lack of unity of the judges and supervision of the courts is the outstanding characteristic of most judicial systems. One could hardly imagine a business concern which employs so many salesmen or executive heads, transacts as much business, expends as much money, and so vitally affects the rights of the people as the courts do, attempting to get along without some sort of get-together of its employees for their mutual improvement.

Certainly much good can be obtained through such conferences. They provide schools of jurisprudence and especially of procedure for the judges. They furnish forums for the discussion of suggested reforms and the crystallization of proper standards of procedure. In short, they bring about a pooling of the ability of all the judges for the common good.

I understand that the Legislature has already returned to the courts of your State full rule-making power. This was undoubtedly a great forward step. By conferring upon the courts the power to prescribe their own rules, you place more squarely on them the responsibility of making the system work efficiently, and in return you are apt to obtain their more complete co-operation.

The lawyers should be taken into the confidence of the court in determining what changes should be made in the rules of procedure. We found in Texas that the judges of the Supreme Court were so far removed from the actual trial of cases that they were largely unfamiliar with the difficulties that lawyers and trial judges were encountering in complying with the rules of procedure. Our Supreme Court appointed a committee composed of appellate and trial judges and trial lawyers to assist them in framing the new rules. These committeemen conducted institutes throughout the State to ascertain what changes were desired by the lawyers. In this way the Supreme Court received the benefit of the advice of competent lawyers from over the State. The mem-

bers of this committee are called together every two years for suggested improvements.

Fourth, we must not overlook any opportunity to improve our relations with the public. The trial judges must remember that it is their courts with which the public most frequently comes in contact, and by which the standard of the whole judicial system is measured. Each judge must remember that any slovenness or failure of duty on his part will bring reflection on the whole judicial system.

We must not overlook the rights of jurors and witnesses as well as the litigants. By the strong arm of the law we may compel jurors and witnesses to leave their businesses and attend court. This is necessary to the ends of justice, and, as a rule, they cheerfully submit to the demands of the court so long as they are kept busy. But if they are required to sit idly around court and wait for exceptions and motions to be argued and other preliminary matters to be disposed of before being called upon to perform their part in the trial, they become impatient and critical of the courts. They cannot understand why they should be called from their work before the court is ready to use them, and, frankly, I do not understand it either. They are not mere pawns to be used by the lawyers in playing a game. They should be kept away from their work only so long as is necessary to enable them to properly perform their functions in the trial of the case.

Much of this unnecessary consumption of the time of jurors and witnesses can be avoided by the proper use of pre-trial procedure. The theory and practice of pre-trial procedure is very simple and is well known to most of you. It contemplates that before any case is placed on the active trial calendar, there shall be a preliminary hearing before the judge for the purpose of adjusting pleadings and disposing of all preliminary matters so that when the case actually goes to trial nothing will remain to be done other than to select the jury and hear the evidence on the really disputed issues. Ordinarily the judge calls such preliminary hearing a few weeks, or, where the term is short, a few days before the case is to be reached on the calendar. The attorneys and usually their clients are required to attend the hearing. The hearing is informal and requires but little time. The first step is to pass on demurrers and exceptions and to ascertain

whether the pleadings are otherwise satisfactory. If exceptions are sustained, or it is otherwise determined that the pleadings should be amended, the parties are given a reasonable time to amend prior to a subsequent preliminary hearing. A discussion is had to ascertain what issues are actually in dispute, and, where it is possible, stipulations are obtained on all undisputed issues. An effort is also made to ascertain whether the case can be settled or otherwise disposed of without trial.

The advantages of such preliminary hearing are many. In the first place, if an amendment should be required, the parties are given a reasonable time in which to amend prior to a subsequent preliminary hearing. In this way, the attorneys are not required to prepare their amendments under the stress of an immediately pending trial. In the second place, the trial judge is not harrassed by the presence of an impatient jury while the exceptions to the pleadings are being argued, and the time of jurors and witnesses is not unnecessarily consumed.

By no means the least advantage to be obtained by pre-trial hearings is the bringing about of satisfactory settlements between the parties. In fact, it is believed that the benefits thus available are alone sufficient to justify the adoption of such procedure. In this connection, I remind you that the judicial process must not be thought of as a duel between the parties or their attorneys, with the judge acting merely as a referee, keeping the score and enforcing the rules of the game, nor must the courtroom be thought of as an arena for the display of showmanship by the attorneys. The dispensing of justice is the fulfillment of the State's highest and most jealously guarded function. Also, I remind you that the litigant does not come to court to have his case run through the process of a formal trial by a jury, as a photographer would run the negative through a prescribed solution to develop the picture. He comes to court to get justice and looks to the judge for that purpose. The judge is hired by the State to bring about justice between its citizens. If a judge as a fair and impartial arbiter can take the parties and their attorneys into his office in an informal hearing and bring about a just solution of their problem without a formal trial, the laudable purpose of the State will have been accomplished, and the bitterness that flows from a trial avoided.

Most litigants prefer to settle their differences. To them a trial is a nightmare. But each party is afraid to suggest settlement for fear his adversary will construe such gesture as evidence that he is "weakening," or his attorney will think that his previous statement of the case is false. The attorney is afraid to suggest settlement, for his client might think that he had sold out to his adversary. When the parties are brought face to face in the courtroom at the preliminary hearing, and they learn what facts are admitted, and what must be proved, and are thus informed of the weakness of their own case, as well as the strength of their adversary's, and are confronted with the realization that they must go to trial at an early date, it is always an excellent opportunity for settlement. A mere inquiry by the trial judge as to whether the case can be settled is all that is necessary to "break the ice" and start the negotiations. Statistics show that in those jurisdictions where pre-trial practice is in force, a large per cent of the cases are settled at such hearings.

Finally, when we have done the best we can to improve the judicial system, lawyers and judges should avail themselves of every opportunity to go before luncheon clubs and other public gatherings and espouse the virtues of the system.

We must refute the false charges brought against the courts, and demonstrate that our system is the best that has been devised. In this connection, I had occasion a short time ago to look into the merits of the charge that it was almost impossible to prosecute a case through court without a reversible error. I was unable to obtain the statistics for this State, but I found that in Texas, from 1939 to 1941, inclusive, of the 170,732 cases disposed of by the trial courts only 1,551 cases, or less than one per cent, were reversed by the appellate courts. I doubt if the average businessman rates better than 99 per cent efficient in the handling of his own business. It is true that many of the cases disposed of by the trial courts were not appealed, but I maintain that it takes just as good a judicial system to try a case so well that it will not be appealed as it does to try it so that it will not be reversed when it is appealed.

The man in the street must be brought to realize that the abundant liberty which he enjoys in this country is due to the fact that he has always had an independent judiciary, which is separate and apart from the other branches of gov-

ernment, to stand between him and punishment; and that while our system does not operate with the speed and promptness of the totalitarian system, where all powers of government are combined in a single agency, it pays larger dividends in liberty. We must not tell these simple inducements of speed and promptness deprive us of our liberty. The people of Europe have speed and promptness under their so-called efficiency system, yet they yearn for just a little of the liberty that is the common heritage of every citizen of this State. Under our judicial system, with a separate and independent judiciary, we are the freest people on earth. Our system may be slow and cumbersome and sometimes expensive, but so long as it keeps us free it is a luxury well worth the price.