THE FEDERAL JUDICIARY

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After hearing Lord Goddard discuss the selection of British judges, it is with trepidation that I attempt to outline our method of selecting judges for the federal courts. Whereas the British lawyers are divided between barristers and solicitors so that judicial selection is made from less than 2,000 barristers who during their professional careers have each belonged to one of the four Inns of Court, in the United States the selection must be made from 225,000 lawyers whose time in court ranges from zero to day in day out specialization in accident cases.

The federal district courts are among the last great remaining courts of truly general jurisdiction. Their judges are expected to try cases in all fields—criminal or civil, jury or non-jury, admiralty, patent, antitrust and bankruptcy, and, in addition, they review the determinations of some of the most important regulatory agencies such as the Interstate Commerce Commission. As our bar is presently organized, it is impossible for any lawyer to come to this bench expert on the basis of his experience alone. Obviously, therefore, the person sought as a judge must be one who has had enough trial experience to control every sort of trial and an aptitude for legal education so that he can in unfamiliar fields match the skill of lawyers who have specialized in that branch of law.

There is no organization which remotely serves the purpose of the four British Inns of Court. There is no cohesive federal trial bar. The bar of this country is organized by communities, not by courts. Judges and trial lawyers do not control these organizations. The associations of specialists such as the Patent Bar Association, the Maritime Law Association and the National Associations of Claimants Compensation Attorneys also run counter to this concept.

This disarray is the aftermath of an attitude popular in our early history which discounted the value of professional train-

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ing and distrusted lawyers, judges, and indeed most public officers. It was an era in which exaggerated fears of arbitrary action led to over-reaching counter measures; it was the era which developed the tradition of elective judges, lay judges, and short judicial terms. This attitude of the Jacksonian period towards lawyers also coincided with the development of the spoils system; the equating of public office to reward political activity rather than an opportunity for public service.

For many years there was no organized bar. When its organizations did form they found themselves weak in contrast to the established political machines which were then their natural adversaries in the development of an independent and able judiciary. Through cycles of scandal, investigation and reform, aided by the consistent rise in general education and the improvement in the mechanics of conducting elections, there has been a steady and now rapidly accelerating demand for the selection of judges on the basis of merit alone.

As I understand it, our purpose tonight is to review the present method of selection and lay plans for future improvements in it.

Selection of Federal Judges

The selection of federal judges is by the Constitution left to the president with the advice and consent of the Senate. Over the years it has become traditional for senators of the president's political party to recommend nominations for federal judicial vacancies occurring in the districts of their states. Where both senators in a particular state are of the opposing party, various persons have undertaken the responsibility for making recommendations to the president. In either case, although recommendations are received from sources other than the Senate, it is virtually impossible to have a person confirmed for a federal judgeship if one of the senators from his state is either openly or secretly opposed to the nomination.

It is the attorney general's duty to investigate these recommendations for the president. Each prospective nominee is subjected to investigation by the Federal Bureau of Investigation, which develops a report as to his reputation for competence, integrity and temperament. Since 1952, it has also been

the practice of the attorney general to ask the American Bar Association's Standing Committee on the Federal Judiciary, of which Mr. Bernard Segal is the present chairman, to report on the qualifications of the prospective nominee. If either investigation shows the person is unqualified, he, of course, is not nominated and further recommendations are required until a satisfactory nominee is found.

The participation of the American Bar Association's committee is being extended because several senators are now willing to withhold the public announcement of their recommendations until the Department of Justice and the committee have had an opportunity to make a preliminary survey. In fact, in several cases the senator has asked that several names be checked to learn their relative standings and to reduce the possibility that the person finally subject to full investigation will be found unqualified. Each of 44 nominees recommended by the President during the past session had been reported qualified by the committee. Perhaps even more encouraging, two-thirds were reported either "well qualified" or "exceptionally well qualified."

It is hoped that in the coming year these achievements can be excelled. To reduce the impact of partisan politics on judicial selection, the President has announced his intention to select nominees from both parties to prevent the situation which developed in a previous administration when appointments were so consistently partisan that finally 84 per cent of the judges came from a single party. Further, he has authorized the Attorney General to assure the Congress that if it will create the new judgeships so badly needed by the courts, they will be filled in a truly bipartisan manner.

Any worthwhile effort to improve the existing method for the selection of federal judges will require more than mere tinkering with the machinery or the formalization of channels of communication between the bar and the president. It will require an intensive effort to bring home to each individual concerned in the process of judicial selection the difference between a federal judgeship and federal patronage. Until the organized bar has balanced its increased influence upon the

action of the President by comparable gains in its influence upon the action of the Senate, our further progress will be of secondary importance.

Capitol Hill's Confidence in Bar Committee is Essential

The difficulties of this undertaking are of course much more complex than those relating to the executive branch because no one man can speak for the Senate. The bar must proceed patiently with its work of persuasion until it is accepted with the same respect on Capitol Hill as it is in the White House. The progress made during the past year convinces me that this acceptance has two requisites—(1) confidence in the accuracy of the committee's reports and (2) confidence in the committee's objectivity. The painstaking thoroughness of Mr. Segal's committee has been of great value. It has consistently withstood each challenge by a sponsor of a rejected appointee. Confidence in the committee's objectivity is possible because there has been no danger that it, or any group of lawyers acting through it, was trying to promote a favorite of its own and thus usurp from the Senate the privilege of making original recommendations.

One final question—do federal judgeships attract the very best men of the bar? Is it really our intention that they shall do so? In most districts we can come very close to that goal but in certain important large city districts the great disparity between the earnings of lawyers and judges produces significant difficulty. In an effort to fill a vacancy in one city, both senators gave me a free hand to find the best man I could. Seven of the best trial lawyers of the city, after great soul-searching, turned down the offer. Although a district judgeship offers an opportunity for rewarding professional work and public service, most persons eligible for nomination are concerned to an understandable extent with the salary and perquisites of office, both as a token of public respect and as insurance against undue sacrifice by their families.

Five years ago these salaries were substantially increased, but Congress fell short of the salary recommended by the distinguished committee which studied the problem. In any

event these salaries should be reviewed every five years as a matter of regular procedure. Further, state trial judges in New York, Chicago and Detroit now receive higher compensation than federal district judges, and in several states the appellate judges are paid more than United States circuit judges. Although it may be unrealistic to hope to bring all federal judicial salaries up to those of the highest state, the organized bar in those states should consider the desirability of a state supplement for the salary of federal judges under these circumstances. Inasmuch as the federal courts in many ways relieve state courts of work for which they otherwise would be responsible, this suggestion does not present a constitutional problem, but one of policy.

Finally, it has never been clear to me why a district judge should be paid a lower salary than a circuit judge. Neither in his cost of living nor in the difficulty and importance of his work, is there a valid basis for the difference. I believe the time has once more come when the bar must face up to this problem.

It is hoped that the President's policy of filling vacancies in the Court of Appeals with district judges will be regarded as a mark of the respect in which these courts are held by him. 22 out of the 66 present circuit judges were elevated from the district court. Since January 1958 the ratio has been eight out 14, or 57 per cent. In Great Britain, I believe the pattern of selection of judges of the Court of Appeal from those of High Court is even more strongly marked.

Development of a Cohesive Trial Bar

The ultimate goal will not be reached until there develops around each district court a true trial bar. Unlike state courts, there is no excuse for a lawyer to be a member of a federal court unless he is going to try cases in it. The names of those who do not come before it with some regularity should be dropped from the rolls and the group which is left organized by the judges and older members into a rough counterpart of the ancient Inns so that by more intimate acquaintance and by mutual criticism the administration of the courts can be im-

proved and the intelligent basis for future judicial selection formed.

In the light of this background, our progress may perhaps be summarized as follows:

1. With respect to action by the president:

a. The organized bar has been brought into a recognized consultative status. At the request of the President, the Department of Justice not only uniformly consults the Standing Committee on the Judiciary with respect to prospective judicial nominees but it now consistently heeds its advice as to their qualifications. Further, this committee's views are sought to an increasing extent as to the relative qualifications of several prospective nominees for the same vacancy;

b. The President has expressed his desire to curb political partisanship with respect to judicial appointments. Now that an approximately even balance between the two parties represented on the judicial courts has been obtained, he intends to make appointments from both parties to avoid the possibility that either party will exceed 60 per cent of the total number:

c. The President has also authorized the attorney general to state that if Congress will pass the presently pending Omnibus Judgeship Bill, the nominations for the newly created judgeships will be made equally from both parties.

2. With respect to action by the Senate:

a. Certain individual senators have acquiesced in or requested through the Department of Justice an informal investigation by the Standing Committee of a prospective judicial nominee before the senator has made his own recommendation to the President.

To keep up the present rate of progress, the following action must yet be taken:

1. Action by the Senate to match that of the President:

a. Recognition of the value of the appraisal of the qualifications of prospective judicial nominees by appropriate representatives of the organized bar.

b. With respect to an individual court to make recommendations which will keep a reasonable balance between the two political parties.

c. To accept the presently pending Omnibus Bill as a proper vehicle for the exploration of the possibilities of truly bipartisan selection.

2. With respect to making district judgeships more attractive:

a. Take appropriate action to provide a review of judicial salaries by the Congress which convenes in January 1961;

b. Survey the possibility of state supplementation of federal judicial salaries in states in which comparable state judges are higher paid.