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The Need for Judicial Reform

Tom C. Clark

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Mr. Justice Holmes once said that "one may criticize even what one reveres."[1] With this caveat I shall proceed to offer some critical comments concerning the Washington judicial structure, its proliferation, its inefficiencies of operation and its methods of selecting and disciplining judges. I am well aware of Mr. Justice Brewer's observation that "many criticisms may be, like their authors, devoid of good taste."[2] However, I shall endeavor to escape this categorization, remembering instead that "better all sorts of criticism than no criticism at all."[3] Indeed, it is "open season" on the courts these days. As Mr. Justice Story reminds us, critics find it much "easier to point out defects than to devise remedies; to touch blemishes than to extract them; to demolish an edifice than to erect a convenient substitute."[4] It is my sincere purpose to be constructive, drawing my conclusions from my service in both the appellate and trial courts of the federal system and a quarter of a century of close contact with the courts of many states. At the outset let me stress that my reverence for the courts and for the judges knows no boundaries. In my view, both have made great progress under the most difficult circumstances. Indeed, in Washington the effort to modernize goes back almost half a century to the creation of the Washington Judicial Council. Since that time the Council has sparked many improvements, such as the integration of the Bar, the adoption of the federal rules of procedure, the establishment of the Office of Court Administrator and the creation of an intermediate court of appeals.[5] It is submitted, however, that the Council has not faced up to some of the basic needs of the state's judicial system. As a consequence, like most of its sister states, Washington still has an anti-

* Associate Justice of the United States Supreme Court (Retired); A.B., University of Texas, 1922, LL.B., 1922.

1. Holmes, *The Path of the Law*, 10 HARV. L. REV. 473 (1897).
2. Brewer, *Government by Injunction*, 15 NAT'L CORP. REP. 848, 849 (1898).
3. *Id.*
4. J. STORY, MISCELLANEOUS WRITINGS 447 (1835).
5. *See* Finley, *The Bare Bones of Court Reform*, 13 ST. LOUIS U.L.J. 171 (1968), for a more detailed coverage of the activity of the Council.

quated judicial structure, an unmanageable court system, an ineffectual judicial selection method and a hollow disciplinary procedure.

I. THE NECESSARY ELEMENTS OF A GOOD COURT SYSTEM

Over two-thirds of a century ago Dean Roscoe Pound laid down the general standards necessary for a good court system.[6] They were unification, flexibility, conservation of judge power, and responsibility. By unification Pound meant a single system with a central authority. The system must have someone in charge, preferably the chief justice, a supreme court with rule-making power over the entire judiciary, an intermediate appellate court to handle nonconstitutional appeals and a trial court of general jurisdiction with necessary divisions for specialized litigation. By flexibility the Dean meant that the system should permit judges or cases to be assigned where necessary in order to attain a balanced case load. In advocating conservation of judge power, Pound foresaw the use of court administrators and para-judges to handle nonjudicial functions necessary to decision making such as clerical and administrative work. Responsibility, the good Dean's word for integrity, diligence, efficiency and sobriety, requires continual training of both the judges and the staff.

II. THE WASHINGTON COURT STRUCTURE

The Washington Supreme Court has nine judges, one of whom serves by designation of the court as chief justice for a two-year term. The justices are all elected on a nonpartisan ballot for a term of six years and receive an annual salary of $33,000.[7] Neither the court nor the chief justice has any managerial control over the judicial system. There is a court administrator, but his power and duties are limited to the collection of statistical and other information on court dockets. There is also a Judicial Council, but it has no managerial authority either.

6. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUD. SOC'Y 178 (1936).
7. WASH. REV. CODE § 2.04.090 (Supp. 1972).

The supreme court, the Administrator and the Judicial Council also have no fiscal control over the system. There is no central budget. While supreme court and court of appeals appropriations are included in the budget of the Administrator, the other courts are financed by the counties, with the superior court judges receiving fifty percent of their salaries from the state. The operations of the courts of limited jurisdiction (district, justice of the peace and municipal courts) are all financed from fines, fees, bail forfeitures and the like collected by them in both civil and criminal filings. This means of financing court operations may run counter to two decisions of the Supreme Court of the United States, *Tumey v. Ohio*[8] and *Ward v. Village of Monroeville*.[9] Although *Tumey* was decided in 1927 and *Monroeville* in 1972, both overturned minor criminal convictions before city courts on the ground that the magistrate was not a disinterested judicial officer. It is difficult to distinguish the court in *Monroeville* from Washington's courts of limited jurisdiction. In *Tumey* the Supreme Court found that paying the judge's salary from fees offered "possible temptation to the average man as a judge to forget the burden of proof . . . or . . . lead him not to hold the balance nice, clear and true between the State and the accused."[10]

The superior court, the only trial court of record in Washington, has unlimited jurisdiction and has ninety-two judges presently sitting in twenty-seven districts.[11] Elected on a nonpartisan ballot for four years,[12] the judges may sit in any district but *only* on *invitation* of the local superior court judge or by order of the governor or chief justice.[13] The salary of the judge is $27,000, half of which is paid by the state.[14] The clerks of the court are selected by the county clerk, who is elected.

Washington has sixty-two district courts of limited jurisdiction with 114 judges. There are also three types of municipal courts, including justices of the peace. Towns of less than 5,000 population have a part-time justice who is paid entirely from fees collected by the court. This is, of course, in violation of *Tumey, supra*. In cities with popula-

8. 273 U.S. 510 (1927).
9. 409 U.S. 57 (1972).
10. 273 U.S. at 532.
11. WASH. REV. CODE §§ 2.08.061-.065 (Supp. 1972).
12. *Id.* § 2.08.060.
13. *Id.* § 2.08.150.
14. *Id.* § 20.08.090.

tions of 5,000 to 20,000 people the judges work part-time, receive an annual salary from $2,400 to $3,600, and may practice law as well. In cities of 20,000 population and over, the judges are full-time and receive $18,000 per annum. All salaries are paid from fees and fines collected in cases decided by the judges or justices. The district judges, the justices of the peace and the municipal judges are all elected for four-year terms. In all of the courts of limited jurisdiction an appeal lies to the superior court where, if the appeal is perfected, the case is tried de novo.

III. SHORTCOMINGS OF THE WASHINGTON COURT SYSTEM

The most serious flaw in the court structure is its total lack of any line of managerial authority, which causes each court to act as a separate entity without any central administrative control. The courts should be unified into a single system with administrative control in the chief justice, the Administrator or the supreme court. The court system should have one budget statewide, with all fines, forfeitures and the like paid into the state treasury. A statewide budget would facilitate determination of the full cost of the court system, which presently is unknown because of the system's atomization. There should be one trial court of general jurisdiction—the superior court—and all of the courts of limited jurisdiction should be merged into it as divisions of the superior court. All appeals from courts of limited jurisdiction should be on the record and not de novo.

The Administrator should be subordinate to the chief justice, who should have the ultimate administrative power over the entire court system. Functioning as the right arm of the chief justice, the Administrator would nominally be the manager of the system. To afford a more continuous administrative policy, the chief justice should be selected for at least five years, preferably serving in this capacity for his full term. All of the administrative and clerical assistants should be selected by the Administrator. Continuing programs of education should be organized for all personnel, including the judges.

Judges should, of course, be selected on a merit plan that would remove them from politics. The merit plan presently used in an increasing number of states employs a commission composed of laymen, lawyers and judges selected on a nonpartisan basis. The commission

usually nominates three persons for each vacancy in the court system, and the governor appoints one of the three nominated. All judges in the state should be included in the merit plan; limiting merit selection to appellate judges is untenable. Indeed, since trial judges are more exposed to political pressure than appellate judges, in my view it is more important to select trial judges under a merit plan than it is to select appellate judges in this manner. Once appointed and qualified, the judge should never be required to thereafter run for his office on a political basis. Instead, at stated periods his name should be on a retention ballot allowing the voters to pass on the sole question of whether he should be retained on the bench. In this time of high cost campaigns, judges should not have to conduct political campaigns for their positions on the bench.

Coupled with the merit selection plan, a disciplinary procedure similar to California's[15] should be adopted to permit the disciplining or removal of a judge for cause without necessity of maintaining an impeachment prosecution. Such a procedure serves somewhat as an ombudsman, providing a check and balance to the tenure granted the judge under the merit selection plan. The procedure is informal and has proven highly successful.

Finally, no judge should be permitted to practice law while serving on the bench. This degrades the judicial process and is one of the chief reasons for public discontent with the judges.

It is only through efficient operation of the judicial system that we can eliminate presently existing injustices which constitute a basic cause of dissatisfaction with the judiciary. All of our people are entitled to equal justice under law. We hear much about maintaining order, but before we can attain it we must listen and respond to pleas for justice. History teaches that we will have neither order nor justice until we attain both.

15. *See* CAL. CIV. & CRIM. CT. R. 901-921 (West Supp. 1972) for the rules governing censure, removal or retirement of judges in California.