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COURT OF THE FUTURE*

SENATOR JOSEPH D. TYDINGS**

History would suggest that the court of the future may well be like the court of the past and the court of the present, only worse. After all, it was in 1906 that Dean Pound said that "[D]issatisfaction with the administration of justice is as old as law. . . ."[1] And it was in 1839 that David Dudley Field, writing of the New York courts, observed that "[S]peedy justice is a thing unknown and any justice without delay almost ruinous, is most rare."[2] It was a poet of the 18th Century who complained that "[H]e must have patience who to law will go,"[3] and Shakespeare who made reference to the "law's delay."[4]

Hundreds of years of criticism and yet our courts today are administered in essentially the same way as they were two centuries ago. Time and time again I have cited statistics to illustrate the dimensions of lagging justice in our courts. There is no need to repeat this dismal recital at length. Instances of delays of two, three or even five years between the time when a case is filed and the time when it is finally brought to trial or settled are too common. The trials themselves can take weeks and the appellate process can take additional years.

Congestion, waste, delay, excessive reverence for the past and fear of change—these, unfortunately, too often are the characteristics of our judicial system. The truth, as Justice Robert C. Finley of the Supreme Court of the State of Washington so succinctly put it, is that, "[W]e have outgrown the American court system as it exists today."[5] Unfortunately, we will not have the luxury of several hundred more years in which to criticize the business of the courts while they proceed as usual. The mills of justice are not only grinding slowly, they are grinding to a halt. Today we have 200 million potential litigants in this country compared with 17 million when Field filed his complaint. A population of 300 million by 1990, only twenty years from now, is not inconceivable.

* Speech delivered at St. Louis University.

** United States Senator, State of Maryland.

1. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep., pt. 1, 395 (1906).
2. Quoted in Vanderbilt, *Clearing Congested Calendars*, 14 NACCA L.J. 326, 327 (1954).
3. Robert Dodsley, *To Patience* (1745).
4. *Hamlet*, Act III, Sc. 1, Line 56.
5. Hearings on S. 1033 Before the *Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 90th Congress, 1st Session at 102 (1967).

The rapid increase in population, the growing complexity of our society, and the intensifying social ferment clearly portend an influx of litigation on a scale heretofore unknown. Our judicial system must change and change drastically, or it will drown in an ever increasing caseload. The ways of our judicial ancestors are not even suitable to meet our problems. They surely will not begin to meet the problems of our children.

I know that in Missouri the call for far-reaching reform does not fall on deaf ears. In 1940 the voters of this state adopted the first judicial selection system designed to substitute merit for politics as the chief criteria for appointment to the bench. The creation of the "Missouri Plan" has since proven to be an event of great significance in the judicial history of the United States. Yet, the laudable Missouri Plan deals only with a part of the problems facing our courts. The American Judicature Society, in noting the significance of the silver anniversary of the Plan, outlined the courts' more comprehensive needs. The Society stated:

> A true court plan for Missouri or any state will make comprehensive provision for a fully integrated state-wide judicial system of which all individual tribunals are units or branches, with centralized, modern and efficient business administration of the whole, with judges chosen under a non-political merit system with adequate provisions for judicial independence and security of tenure and for compensation, retirement, discipline and removal; with accessible, economical and competently staffed minor courts; and with judicial procedures that are simple, efficient, uniform, speedy and economical.[6]

For the past fifty years, court reformers have advocated the creation of unified state courts. Although the problems obviously vary from community to community, most judicial systems have suffered from a proliferation of autonomous and semi-autonomous courts with specialized but often over-lapping jurisdiction. Criminal courts, equity courts, probate courts, domestic relations courts—the list of categories and sub-categories goes on *ad infinitum*.

This proliferation of small judicial empires wastes our meagre judicial resources. Such waste would be eliminated in a simplified, unified system. Moreover, a unified system, with centralized administrative authority, can make maximum use of available judicial manpower by assigning judges where needed to cope with excessive case loads or cases demanding special treatment.[7]

Obviously the power to assign judges where needed in order to

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6. 49 *Judicature* 83, 85 (Oct. 1965).

7. A good example of the type of problem demanding special treatment is the mass of civil antitrust litigation which resulted from the conviction in 1961 for violation of the antitrust laws by most of the manufacturers of the major heavy-duty electrical equipment used by the power companies. For a full discussion of the problems which evolved and the effective manner in

insure maximum efficiency in the flow of cases is meaningless if the court does not have the information and knowledge necessary to determine where a judge is needed and which one should be sent. Consequently, the court of the future must not only be "centralized," but have "modern and efficient business administration of the whole," including the ability to get the right people to the right place at the right time.

Courts will not have modern and efficient administration until they begin to tap the knowledge of management consultants and systems analysts. To date, such experts have largely been ignored in the development of ideas for improving the administration of our courts. A partial explanation of the reluctance of most courts to use management consultants and systems analysts and the ideas they can generate stems from the notion that only judges and lawyers understand the real needs of the courts. This notion has not been dispelled by their apparent inability to solve the problems of the courts.

In order to avoid administrative chaos, the court of the future, as I see it, must have as an integral part of its administrative machinery a court administrator or executive, subject to the general supervision of the judge responsible for administration. This court executive will be skilled in modern management techniques and the social sciences and, utilizing such knowledge and modern business machines, including computers, will study and improve the administration of the court system. Such an executive will not only plan more effective use of court space and supporting personnel, but will also streamline management of the court's calendars and dockets and supervise the flow of cases through the system. He will not make judicial decisions. He will be responsible for seeing that cases are moved to a point where the judge's art can be employed to hear and decide the matter.

A judge's time must be conserved for the exercise of the judicial function. He should not be, as too many judges are now forced to be, a personnel manager and a calendar controller. His expertise lies in applying the rules of law to the facts of a case and in preserving the integrity of our judicial process. His expertise does not lie, nor can it be expected to lie, in the more mundane but indispensable management function of assuring that cases are not lost or ignored on the dockets, or that competent and professional supporting personnel are hired and employed effectively. There is no necessary correlation between the qualities that make a good judge and the qualities that make a good administrator.

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which the Federal courts dealt with them see the hearings on S. 3815 Before the *Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Congress, 1st Session (1966).

An example of what a court utilizing a management staff and computers can accomplish is provided by the Superior Court of Los Angeles, a trial court of more than 120 judges serving a vast and growing metropolitan area. There, a court administrator working hand-in-hand with a series of forceful presiding judges implemented reforms in docket control that reduced delay in civil jury cases from more than two years to less than 6 months.

With centralized administration and managerial expertise the battle for "simple, efficient, uniform, speedy, and economical procedures" is half won. The rest of the battle for the court of the future involves a willingness to reevaluate the sacred cows of court procedure and to attract the best men available to the bench.

Not only must we make our courts efficient in the management of their business, but we must be willing to think the unthinkable with regard to many of our time honored judicial practices. We have made advances. For example, three decades ago, before the evolution of the Federal Rules of Civil Procedure, pretrial discovery was considered the devil's own creation. Today, it is an integral part of every sound judicial system.

Pretrial discovery struck a blow at our former reverence for trials as a game of chance. Our trial process has not been corrupted; in fact, many attorneys wonder how the system got along without civil discovery. I do not doubt that lawyers three decades from now will wonder at our reluctance to allow criminal discovery and at our present reverence for an appellate process which stresses the production of complete trial transcripts, verbose appellate briefs, and lengthy appellate opinions regardless of the nature of the issues in the case.

Better managed courts using procedures grounded in reason, not history, will, however, provide a better brand of justice only if the best available legal talent is attracted to and retained on the bench. It will not be if political loyalty is the chief criteria for selection. It will not be if judicial salaries and retirement benefits are such that excessive financial sacrifice is demanded of those appointed to judicial office. It will not be if the judiciary has no authority or machinery to police itself, to retire incompetent judges and remove unfit judges.

The problem of politics in the courts, insufficient compensation, and resulting degradation of the law is nowhere more apparent than in the lowest tier courts. The problems of the courts in general are magnified ten fold at the lowest level and it is at this level, unfortunately, that the average American, the one with the traffic ticket and the small claim, forms his opinion of our judicial system.

We must recognize the great capacity these courts have for affecting the lives of our people and either destroying or invigorating their reliance on the law as an instrument of justice. We can no longer endure in silence the shocking conditions that exist in too many of our lower courts. The President's Commission on Crime well described the conditions found in these courts as "assembly line justice." Too often, shoddy judicial performance, inadequate counsel, slipshod procedures and even bartered justice in these courts have been either blinked at or ignored by leaders of the bar, legislatures and the higher courts.

If we are to improve the first echelon of justice, our lower courts must be restructured and competently staffed. Judges at this level must be most carefully selected. Public counsel must be made available to assist those too poor to hire attorneys to represent them in these courts.

In a very real sense our lowest courts are courts of last resort for the millions who seek justice there. They must have the attention and concern which this fact demands.

Our concern for these courts as with all levels of our judicial system must include concern for the substantive law that they are applying. Today, too many Americans view the law not as the guarantor of justice and equality, but rather as a tool of an oppressive society. In the court of the future, cases should be decided by the application of doctrine relevant to the future and to the problems of all members of our society, relevant to the problems of the tenant as well as the landlord, the consumer as well as the merchant, the debtor as well as the creditor, the client as well as the lawyer.

Our courts face obvious problems. That we have the tools, the knowledge and the ability to deal with the problems is also obvious. What is not obvious is whether or not we will achieve it; whether or not the public will fight for it; whether or not our legislatures and executives will be willing to eliminate politics from the selection of judges; whether or not judges will permit themselves to be policed or police themselves so that those who are too sick, too old, too inept, or too dishonest to serve will be removed from the bench; whether or not Bar Associations and lawyers will concern themselves with the *system* as well as the *economics* of the *system*; whether or not court clerks will view efficiency as a worthwhile goal rather than viewing every innovation as an encroachment on their prerogatives; whether or not law schools will involve themselves in the community and in the courts? In other words, it depends on whether or not we really wish to develop the court of the future and whether we are willing to make the sacrifices necessary to do so.

Quite frankly, we cannot afford not to. As the late John J.

Parker, the distinguished Chief Judge of the Fourth Judicial Circuit, said over 25 years ago,

> . . . if democracy is to live, democracy must be made efficient; . . . if we would preserve free government in America we must make free government, good government. Nowhere does government touch the life of the people more intimately than in the administration of justice; and nowhere is it more important that the governing process be shot through with efficiency and common sense . . . nothing else that we can possibly do or say is so important as the way in which we administer justice. The courts are the one institution of democracy which has been entrusted in a peculiar way to our keeping.