AN APPRAISAL OF THE JUDICIAL FITNESS AND OF THE PRESENT SYSTEM OF JUDICIAL SELECTION

Chief Justice Marshall's observation that "the greatest scourge an angry heaven ever inflicted upon a sinning people was an ignorant, a corrupt or a dependent judiciary" was not a mere flourish of rhetorics. No other branch of the government has greater power over life, liberty and property than the judiciary. For the modern realists, the law, in a very real sense, is the adjudicative or judging process. In other words, what the adjudicative organ does about disputes and controversies based on the effective operative facts as well as on extra-legal stimuli or factors is what the modern realists mean by law.[1] The type of judges appointed to the bench, therefore, lends itself to common concern.

I. WHO IS THE BEST JUDGE?

The Constitution of the Philippines and the Judiciary Act of 1948 lay down the legal qualifications necessary for appointment to the Supreme Court and the inferior courts of general jurisdiction.[2] We need not belabor the point that such constitutional and statutory provisions do not guarantee the best, or for that matter a good, judiciary.

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[1] PASCUAL, C., THE NATURE AND ELEMENT OF THE LAW, 130-132 (1954 Ed.)

[2] Sec. 6, Art. VII of the Constitution provides: "No person shall be appointed member of the Supreme Court unless he has been five years a citizen of the Philippines, is at least forty years of age, and has for ten years or more been a judge of a court of record or engaged in the practice of law in the Philippines."

Sec. 8 provides: "The congress shall prescribe the qualifications of judges of inferior courts, but no person may be appointed judge of any such courts unless he is a citizen of the Philippines."

Sec. 28 of Rep. Act 296 provides: "The justice of the Court of Appeals shall have the same qualifications as those provided in the Constitution for members of the Supreme Court."

Sec. 42 provides: "No person shall be appointed district judge, judge at large or cadastral judge unless he has been five years a citizen of the Philippines and has practiced law in the Philippines for a period of not less than five years, or has held during a like period, within the Philippines, an office requiring admission to the practice of law in the Philippines as an indispensable requisite."

Sec. 71: No person shall be eligible to appointment as justice of the peace or auxilliary justice of the peace unless he is (1) at least twenty three years of age, (2) a citizen of the Philippines, (3) of good moral character and has not been convicted of any felony, (4) has been admitted by the Supreme Court to the practice of law.

"No person shall be appointed judge of the municipal court of any chartered city or justice of the peace of any provincial capital unless he shall have practiced law in the Philippines for a period of five years or has held during a like period within the Philippines an office requiring admission to the practice of the law in the Philippines, as an indispensable requisite."

The success of the United States Supreme Court, as pointed out by Chief Justice Hughes, depended not upon "constitutional formulas but primarily upon the quality of the men selected."[3]

Rufus Choate explained that the best judge should in the first place be profoundly learned in the law and must know how to apply that learning. In the second place, he must be endowed with the capacity for disinterested judgment, must never bend an ear to the dictates of his prejudices, must never be a respecter of persons.[4] Justice Holmes' classic statement concerning his part as a judge in the development of the legal process has verity in this connection.

> "But I have found it a help to clear thinking to try to get behind my conventional assumptions as a judge whose first business is to see that the game is played according to the rules whether I like it or not. To have doubted one's own first principles is the mark of a civilized man."[5]

The judge should also have honesty and courage. By honesty is meant intellectual as well as financial honesty. In other words the judge must not only be incorruptible but must also be honest in his thinking and in his application of the law to the facts. Courage includes to do what is right even in the face of unpopularity or at the cost of a great sacrifice.[6] Also a necessary quality which our judges should have and which has become the more obvious as a result of the tremendous backlog of pending cases in our courts at present is that of industry.[7]

Another of the more important attributes that the judge should possess is that of statesmanship of a high order, for which, says Justice Frankfurter, "many a lawyer is fully unsuited, however high-minded and however learned in the law." The importance of such an attribute should never be lost sight of. For against the background of cases involving transient rights and obligations of individuals, the courts perform the role of deciding controversies in the light of national policies in the event of ambiguity of laws, resolving momentous economic and social problems, establishing the limits of governmental authority and its impact upon fundamental human rights. Upon far-sighted and statesman-like courts, therefore, depend the well-being of our country.[8]

The administration of justice is an intensely practical matter, and those who are to have it in charge, particularly the trial judges,[9] should

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[3] Cited in SINCO, V. G., PHILIPPINE POLITICAL LAW, 10th Ed., 1954, 323.
[4] Rufus Choate on Judicial Tenure, 19 Lawyer's Journal, 317-324 (1954).
[5] "Ideals and Doubts" in COLLECTED LEGAL PAPERS, 307 (1925).
[6] Parker, J., The Judicial Office in the United States, Tenn., Law Rev. 705 (1949).
[7] Paras, R., *The Philippine Judiciary*, 28 Phil. L. J. 824 (1953).
[8] Sinco, *op. cit.*, p. 324.
[9] According to Parker, there are three functions of the judge, *viz.*, (1) the administration of justice, (2) to declare the law, (3) to uphold the constitution as the supreme law of the land. The administration of justice, according to him, while being a function of all judges particularly belongs to the trial judge. Parker, *op cit.*, p. 704.

have a special training for it thru practical experience in life and law. The appointee should have been in the bar long enough to become thoroughly acquainted with the life of the community and the problems with which the law is called upon to deal; and not long enough for his mind to have become narrowed down by the specialized practice in which he may have been engaged.

Finally, the judicial character and intellect should be tempered by an "understanding heart," or, one might say, with the continuing postulates of the natural law, namely, justice, equity, fairness and righteousness.[10] The power which the judge exercises is so great that he can easily break the ordinary man; the poor and the weak are so helpless in his hands. As Judge Parker says:

> "An understanding heart was the gift of God asked by the ancient king; it is the gift of God above all other that the judge should pray for. The bench is no place for the cruel or callous man whatever other qualities or abilities he may possess."[11]

II. PRESENT SYSTEMS OF JUDICIAL SELECTION

How best to secure men possessing these attributes of judicial fitness is the essence of the local problem of judicial selection. Undoubtedly, the best system would be that which sends to the Bench men who are judicially fit.

There are two main systems of judicial selection: 1) by direct election, and 2) by appointment. In all the countries of the world, except in the cantons of Switzerland and in the United States, judges are appointed, not elected.[12] In three-fourths of the states of the United States, judges are elected by the vote of the people.[13]

Intelligent opinion in the United States is dissatisfied with the prevailing system of selection there.[14] The qualities demanded by the judicial office of persons aspiring to the bench make elections highly undesirable as a method of selection. Elections assault upon the dignity of the judicial office,[15] induce timidity and discourage independence.[16]

Our system of judicial selection, appointment by the President with the consent of the Commission on Appointments,[17] is far from being

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[10] Pascual, *op cit.*, 7 (1954).

[11] Parker, *op cit.*, p. 705.

[12] Hyde, L., Judges: Their Selection and Tenure, 22 N.Y.U. Law Q. Rev., 391 (1947).

[13] Hill, B., Has Wyoming A Problem in Judicial Selection? W. Law Jrnl. p. 53.

[14] Report of the American Bar Association Committee on Judicial Selection and Tenure, 62 A.B.A. Rep. 893 (1937).

[15] Choate, *op cit.*, p. 322.

[16] James Bryce, cited in Hyde, *loc. cit.*, p. 392.

[17] Sec. 5, Art. VII of the Constitution provides: "The members of the Supreme Court and all judges of inferior courts shall be appointed by the President with the consent of the Commission on Appointments." The above provision is principally implemented by Rep. Act No. 296. Its pertinent provisions all provide for appointment "by the President with the consent of the Commission on Appointments." Secs. 11, 24, 40, 60.

satisfactory either. Although the President is checked in the exercise of the power of appointment by the Commission on Appointments,[18] it has been our demoralizing experience that appointment to the bench is in no small degree influenced and determined by the exigencies and the logic in our system of party politics. Either political pressure is exerted on the President,[19] or we may have a Jackson for a President to whom the judicial offices are but part of the spoils. Even a good President would have to accede to the desires or pressure of Congressmen and other private pressure groups in matters of appointment to the judiciary; for he cannot ignore or brush aside their support in matters of more and direct importance to the success of his administration.[20]

Our system of judicial selection has also been influenced by certain practices which have developed through the years. In practice, appointments to the appellate courts in the Philippines, as a rule, are made on the basis of seniority. Thus, in the appointment of justices of the Philippine Supreme Court, it has been the practice in recent years to elevate to that body the presiding justice of the Court of Appeals.[21] And to fill in the positions in the Court of Appeals, judges from the lower courts are promoted.[22] As a matter of fact if the President were to appoint to the Supreme Court or Court of Appeals, men who have had little or no experience at all in the judiciary or in the practice of the legal profession, this would be cause enough to strongly protest the President action.

While the rule of seniority has several merits, it would not be amiss to know how appointments to the judiciary of the United States are made. It is significant to note that the judicial history of the United States is interspersed with great names, law men, who were legal scholars and teachers—such men like Story and Holmes. Chief Justice Marshall who is regarded by most as one of the greatest who ever sat in the United States Supreme Court had never been before a judge in his life. The men appointed to the United States Supreme Court are not selected merely on the mechanical basis of seniority, nor are they necessarily recruited from the lower courts. They are generally professors of law, jurists, great lawyers, and statesmen, selected without regard to previous

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[18] The present system of appointment was adopted on this principle, as attested to by the debates and deliberations of the Constitutional Convention. In a speech indorsing approval of the present system of appointment as against the original Francisco proposal, Delegate Cuenco argued: "that the plan of submitting presidential appointments will compel the President to make judicious selection of his nominees, proposing only the names of those who by their qualifications could stand the test of a rigid, searching investigation and criticism of the representatives of the people." See Aruego, J. The Framing of the Philippine Constitution, 271 (1936).

[19] Tolentino, A., Remedial Measures for the Preservation of the Independence of the Judiciary, The Law Review, 261 (1953)

[20] Hyde, *loc. cit.*, p. 394.

[21] TAÑADA AND FERNANDO, 2 CONSTITUTION OF THE PHILIPPINES, 1107 (1953).

[22] Aruego, *loc. cit.*

experience in the judiciary. Except for Chief Justice White and Chief Justice Stone, none of the other Chief Justices were promoted to that high position from the position of associate justice. And, more often than not, the posts of associate justice were filled by men chosen not from the lower courts but from the other departments of the government, or from law schools, or from law offices.[23] What is the net result of this practice observed by the President of the United States in making judicial appointments? The Supreme Court of that country, it may be pointed out, has earned for itself the praise of being perhaps the most enlightened court in the world and of having escaped the "narrowness of a Philistine" in interpreting and applying the constitution.[24]

III. PROPOSALS FOR REFORMS

As a result of the dissatisfaction with the present system of selection, several proposals have been advanced with the end in view of maintaining a thoroughly qualified and independent judiciary where politics will be kept out of judicial selection as much as possible.

One view[25] would remove the appointing power from the Chief Executive and vest it in the Supreme Court or in the Chief Justice. There are compelling reasons in favor of this proposal but it is not here recommended. For to invest the Supreme Court or the Chief Justice with the totality of the power of appointment would be to run counter to the principle of checks and balances—one of the fundamental safeguards of a republican government. If, however, it be offered as a compromise to subject their appointments to confirmation by the Commission on Appointments, then we would be in no better position as now. Members of Congress could easily apply pressure on the Court into nominating their recommendees at the threat of refusal to confirm any other appointment. Moreover, a justice of the Supreme Court should not be placed in a position where he may be subjected to political pressure and where he may incur animosities by reason of the exercise of that power.[26]

Another proposal put forward is to hold competitive examinations[27] for candidates to judicial offices in much the same way as civil service employees. This suggestion is, to say the least, unsound in principle. Competitive examinations determine the possession by the candidates of only one of the several qualifications demanded. The judicial temperament and character cannot be discovered through the expediency of an examination. This proposal may only be considered and adopted as

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[23] Sinco, *loc. cit.*
[24] *Ibid.*
[25] HUTCHESON, E., *The Administration of Justice*, 23 A.B.A. Jrnl. 1937.
[26] *Ibid.*
[27] Tolentino, *loc. cit.*, p. 262.

a detail in the determination of the qualifications of judges. But as constituting by itself a complete system of judicial selection, it is obviously inadequate.

There are two systems of selection which we feel have much to recommend for themselves. The fundamental defect of our present system of judicial selection, as already pointed out, is the fact that both the nominating and confirming powers are political agencies. The inevitable result of such a system is naturally to have political appointees. With respect to appointments to the Supreme Court, Court of Appeals and the Courts of First Instance, without taking the appointing power away from the President, it is submitted that the power of confimation be vested in the Supreme Court, instead of in the Commission on Apointments. We will then have a system where two different agencies participate in the process of appointment, which is in conformity with the principle of checks and balances and at the same time reduces to a great degree the possibility of politics in the judiciary. The lessons learned from the experience of having a system of appointment geared to party politics have clearly demonstrated the failure and the inefficacy of a confirming body like the Commission on Appointments. Whereas such a group was conceived on the assumption that it will function as a restraining body on the President in his exercise of the appointing power, it has in the past either degenerated into a mere rubber stamp in the hands of a strong and powerful executive, blindly confirming whatever appointment it may please him to make, or grown into a powerful group arbitrarily blocking all presidential appointments for reasons unrelated to the merits of the nominees. Too often has the power of confirmation been utilized as an instrument of political intimidation or as a factor in political manuevers in the never ending contest for political ascendancy.

All these evils, it is believed, will be avoided by the transfer of the confirming power to the Supreme Court which by its nature and tradition is far removed from the influence of partisan politics. The Supreme Court would therefore be less susceptible to influence and considerations which are political in nature. Moreover, it would make the appointing power think twice on the judicial fitness of the nominee.

As former Senator Vicente Francisco[28] correctly pointed out, there are definite advantages to be had in having the Supreme Court as a confirming body: firstly, by having greater familiarity with the relative judicial capacity and qualification of the applicants it is logically in a far better position to confirm judicial appointments; and, secondly, being

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[28] Former Senator Francisco, who was chairman of the Committee on Judicial Power of the constitutional convention, proposed that the Supreme Court, not the Legislature, confirm judicial appointments.

mainly responsible for the administration of justice, it would naturally feel and take seriously this responsibility in the confirmation of those who will help it in the legal or judicial ordering of society.

The other commendable system[29] has something to do with appointments to municipal and justice of the peace courts. The power of appointment to these courts is to be exercised by the President, but from a list made by a selection commtitee to be composed of the Chief Justice of the Supreme Court (or the Presiding Justice of the Court of Appeals) as chairman, three lawyers to be elected by the bar, and three laymen appointed by the governor of the province or the mayor of the city as the case may be, as members. After a period of judicial service, say four years, the judge should go before the people on the question of his retention in office upon the basis of his record and judicial character.

This plan utilizes the best features of both the appointive and the elective systems and as a whole provides safeguards lacking in either. It really amounts to appointment by the Executive with indirect confirmation of the committee and the retention by the direct action of the electorate. This "confirmation-retention" by the vote of the electorate is, we dare say, an excellent remedy for mediocre appointees and an impelling drive for judges to have a good record. This is an instance where an integrated or organized bar becomes necessary, for the bar by its nature should be the instrumentality by which the record of a judge is appraised and presented to the public. The bar, not the judge himself, should work for the judge's retention or his removal. It is essential, therefore, that we have an alert bar.

IV. CONCLUSION

It should be mentioned here that in suggesting the foregoing reforms, no pretense is made that they are foolproof. Men being subject to human frailties, it would seem that no system of judicial selection can ever be devised which will totally eliminate the evils and defects

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[29] The house of delegates of the A.B.A. in January 1937 adopted a resolution which specified two essential provisions for establishing a method of judicial selection with the end in view of maintaining a "thoroughly qualified and independent judiciary and that will take the judge out of politics as nearly as may be." These provisions were: (1) appointment by the executive "but from a list named by another agency composed in part of high judicial officers and in part of citizens selected for that purpose who hold no other public office." (2) After a period of service, the appointee should "go before the people upon the question, 'Should Judge ——— be retained in office?"

In 1940, Missouri adopted a constitutional amendment which put into effect the complete plan recommended by the American Bar Association.

sought to be avoided. But in constructing our system of judicial selection, if and when the occasion arises, it would perhaps serve us in good stead to always bear in mind the words of Choate:

> "If your system of appointment and tenure does not present a motive to the youth of the profession...to conceive in the solitude of their libraries, the idea of a great judicial fame and usefulness and by profound study and the manly practice of the profession alone seek to realize it; to so prepare themselves in mind, attainment, character to become judges by being lawyers only...if it discourages them, if it disparages them, in so far it is a failure." [80]

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[80] Choate, *loc. cit.*, p. 323.