The Administration of Justice as Affected by Insecurity of Tenure of Judicial and Administrative Officers

Charles A. Riedl
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CHARLES A. RIEDL

An extremely important part of the task of government is the administration of justice. Everybody knows in a general way what is meant by the term, administration of justice, but when we attempt a precise definition, we find ourselves immediately in difficulty. The problem which presents itself is to determine the relation between law and the administration of justice. On this point there are two distinct schools of thought. The one, to which the average layman subscribes, is of the opinion that the administration of justice is synonymous with the administration of the law. Its justice is always "according to law." It conceives the judicial process as more or less mechanical, as an application of existing laws to particular cases. Its quest is for what Mr. Walter Lippman has called an "automatic governor"; its ideal, "a government of law, not men."

Opposed to this school of thought is the opinion of an increasingly large number of lawyers and judges who maintain that there is, and should be, a large element of "judicial discretion" in the administration of justice. Such legal giants as Roscoe Pound, Justice Cardozo, and the late Justice Holmes, insist on the importance of judge-made law as a part of wise "social engineering." This pointing out of the part played by the social, economic and philosophical background of the judge in shaping judicial decisions is one of the main contributions of the sociological school of jurisprudence of which these men are the chief exponents. Regardless of how we feel on the question it is imperative that we adopt a realistic attitude toward the fact of the existence of judge-made law.

Granting that the ideal for the governance of human society would be a set of laws so perfect and complete that the judge need but decide which statute to apply in order to effect substantial justice, we are forced to admit that the existence of such a body of laws is an empty hope, a thing "that never was on land or sea," nor will be. The impossibility of an ideal set of laws flows from the very nature of human existence, in which the only constant thing is change. Law, in order to

1 Cf. on this subject Pound, The Theory of Judicial Decision (1923) 36 Harv. L. Rev., 641, 802, 940; Pound, An Introduction to the Philosophy of Law, c. 3. For Cardozo's views see The Nature of the Judicial Process, the Growth of Law; see also Holmes, The Common Law and Collected Legal Papers.
keep pace with man, in order to develop in harmony with the subtle nuances of his development, in order to adapt itself to the complexities of his constantly changing environment, would need to be a veritable chameleon. In reality it much more closely resembles the northern star in its constancy and changelessness.

Aristotle recognized this fact of the insufficiency of law to provide a solution for all cases. He drew too the inevitable corollary of the necessity of some element of man-made justice. But in doing so he did not fail to point out the danger to be anticipated from the presence of this human, variable element in administering the law, this “element of the beast,” as he so graphically describes it. He says “He who bids the law rule may be deemed to bid God and reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.”

The traditional statue of Justice, represents the goddess, blindfolded, holding a scale in one hand and a sword in the other. The symbolism of this representation of Justice portrays the ideal which men have set up for the administration of justice. They require of justice that it shall be impartial, that it shall be no respecter of persons, that it shall hold all men equal before the law. These requirements are set forth eloquently and forcefully in the famous “Speech on the Judicial Tenure” by Rufus Choate. He says of the judge:—“He shall know nothing about the parties, everything about the case. He shall do everything for justice; nothing for himself; nothing for his friend; nothing for his patron; nothing for his sovereign. If on one side is the executive power and the legislature and the people—the sources of his honors, the givers of his daily bread, and on the other an individual nameless and odious, his eye is to see neither, great nor small; attending only to the ‘trepidations of the balance.’ If a law is passed by a unanimous legislature, clamored for by the general voice of the public, and a cause is before him on it, in which the whole community is on one side and an individual nameless and odious on the other, and he believes it to be against the Constitution, he must so declare it—or there be no judge. If Athens comes there to demand that the cup of hemlock be put to the lips of the wisest of men; and he believes that he has not corrupted the youth, nor omitted to worship the gods of the city, nor introduced new deities of his own, he must deliver him, although the thunder light on the unterrified brow.”

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2 As in other sciences, so in politics, it is impossible that all things should be set down precisely; for enactments must be universal, but activities are concerned with particulars. ARISTOTLE, ETHICS V, XIV; POLITICS II.
3 ARISTOTLE, POLITICS III, XVI.
in the exercise of the judicial function, is "the personification of justice."

The judicial power of the United States under the constitution is vested in the Supreme Court and such inferior courts as Congress may establish. The judicial power of the forty-eight states under the respective state constitutions is vested in a supreme court, and inferior courts which are either specifically designated in the constitution or set up according to provisions therein. These courts are commonly known as constitutional courts, and their power is limited to judicial functions.

In reality though, there are two other classes of tribunals that exercise judicial power. The first are the so-called legislative courts. Under the constitution of the United States, Congress is given the power, among others, to (1) regulate commerce (2) appropriate money to pay claims against the United States (3) make all needful rules and regulations of government of the territories, and (4) exercise exclusive jurisdiction over the District of Columbia. Under these grants of power, Congress created the Court of Custom Appeals, the Court of Claims, the territorial courts, and to some extent the courts of the District of Columbia. The respective state legislatures, by power conferred upon them by the state constitutions, establish courts of this same class with limited jurisdiction. These legislative courts may be empowered by statute to exercise a greater power than that given to constitutional courts, in that they exercise functions which have been referred to as quasi-judicial, quasi-legislative, and administrative.

The judicial function is vested in still another class of tribunals, namely the administrative boards and commissions. These are sometimes referred to as "executive courts." They represent on the one hand an effort to overcome the inevitable inefficiency inherent in a government of divided powers, and on the other, an effort of government to adapt itself to the increasing complexity of social life. Another reason assigned for their rapid spread is that "they have held promise of expeditious, accurate, effective and inexpensive action. Their creation represented in part the public's revolt against a court system which exalted contentiousness. The necessity for the establishment of some of these agencies might have been obviated by our seasonably dredging of the existing channels of justice." There is a tendency in certain quarters to view with alarm what is considered the "usurpation" of the judicial prerogative by these boards and commissions. However, it is the opinion of experts that these administrative boards are with us to stay and will not easily be stripped of their judicial powers.

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The extent of this administrative adjudication becomes apparent, when our attention is directed to the fact that in January, 1935, in the federal government alone there were “73 federal administrative agencies, exercising judicial power in 267 classes of cases, but—these totals may be open to criticism for including doubtful or borderline cases . . .” The respective states, after 1900, established boards and commissions of this same class under state statutes, to aid in the multiplication of activities undertaken in state administrations. A list of administrative boards in most of the states would include eleven main groups of interest and activities, although no complete list has been made.

Any consideration of the administration of justice, necessarily, brings up the question of tenure, because of the bearing it has on the question of judicial independence. This is very forcefully expressed in the words of Hamilton that “in the general course of human nature, a power over a man’s subsistence amounts to a power over his will.” Tenure is either “during good behavior” or for a limited number of years. It is impossible to consider the question of tenure without at the same time considering the closely related problems of personnel and method of selection. The question of personnel, while it applies necessarily to the selection of judges, is of vital importance in a consideration of the allocation of judicial discretion to the members of administrative boards and commissions. We cannot but agree with the conclusion drawn by a recent writer on this subject, that “powers confidently entrusted to a department head in the national government may seem strangely out of place in the hands of a village poundmaster.” The possible methods of selection include appointment, popular election, and some system based on merit, such as civil service.

An examination of the present status of tenure reveals a marked divergence in practice on this point among the three classes of courts. The federal judges of both constitutional and legislative courts hold office “during good behavior.” This is not true concerning the judges who hold office in the constitutional and legislative courts in the respective states. The vast majority of the states follow the system of popular election of judges. The general practice in both the federal and state governments in the selection of members for administrative boards and commissions is to appoint them for a limited number of years. The precarious status of these offices is described in the Report

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9 Ogg and Ray, INTRODUCTION TO AMERICAN GOVERNMENT (2d ed.) 647.
11 THE FEDERALIST, No. LXXIX, (Lodge, 1923) 491.
13 ENCYCLOPEDIA OF SOCIAL SCIENCES: “Judiciary.”
of the Special Committee on Administrative Law of the American Bar Association that "No member of an administrative tribunal enjoys life tenure . . . The most that is enjoyed by an administrative agency (other than elected officials) is a definite term of years in office, subject to removal by, the President for specified causes couched in such vague language as 'inefficiency, neglect of duty or malfeasance in office.' Most of the remaining agencies are in charge of persons having a status of day-to-day employees, more or less certain to lose their positions with a change of political administration."\(^4\)

We can, perhaps, obtain a clearer understanding of the issues involved in the question of tenure, by viewing it in its historical development. In early English practice, it was quite generally conceded, that the decisions of the judges were dependent upon the pleasure of the king. This was a natural outgrowth of the fact that judges held their offices at the king's pleasure. Justice Berkeley in *Hampden's Case* in 1637 boldly asserted that "The law is of itself an old and trusty servant of the King's; it is his instrument or means which he useth to govern his people by. I never heard or read that lex was Rex; but it is common and most true that Rex is lex." Under the rule of the Tudor and Stuart kings judges held their office at the pleasure of the king, and bowed to the will of the king. The king consulted with the judges beforehand, and anyone who showed the slightest independence was dismissed. King James I before the trial of the famous *Peacham's Case* in 1614 called in the judges for consultation. Sir Edward Coke, the Chief Justice, staunchly opposed this action in taking the opinion of the judges beforehand, since it prejudiced them in the hearing of the case and gave the King the chance to dictate what their decision should be. In 1616 the matter came to a crisis. The King removed Sir Edward Coke, when in the case brought against the Bishop of Lichfield, Coke refused to obey the will of the King saying that when a case came before him, he would act as became a judge. "There is not in history a more terrible example of judges perishing at the royal nod than this, nor a stronger evidence that the power and prerogative of removing judges at pleasure were allowed to be, by law, in the crown. It was loudly complained of as a grievance, no doubt, and an arbitary exertion of prerogative; but it was allowed to be a legal prerogative still."\(^5\)

In 1700 Parliament enacted the Act of Settlement, which was a great step taken to protect the English people from the King, in that into the commission of judges was written the principle that their tenure should be made *quamdiu se bene gesserit*—"during good


behavior," instead of at the pleasure of the King. This new doctrine was not invoked for the purpose of making judges independent of the people, but to make judges independent only to such a degree that they would not yield to might as against right.

The Act of Settlement did not apply in the colonies. In fact, King George III undertook to pay the salaries of the judges in the Massachusetts Bay colony, when a dispute arose between John Adams and Gen. William Battle, a senior member of the Council, wherein John Adams pointed out\(^6\) that there was nothing in the commissions of the colonial judges which could not prevent their removal by the Crown, thus making the judges dependent upon the continued favor of the Crown for the retention of their judgship. In fact one of the grievances cited in the Declaration of Independence was that the King of Great Britain had "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." It was therefore natural that all the delegates to the Constitutional Convention in 1787, a majority of whom were lawyers, with the colonial experience with royal judges still fresh in their mind, agreed that the judges should hold office during good behavior.\(^7\) Hamilton referred to this practice as "one of the most valuable of the modern improvements in the practice of government." He said:—"According to the plan of the Convention, all judges who may be appointed by the United States are to hold their office during good behavior; which is conformable to the most approved of the State constitutions, and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body."\(^8\)

In the middle of the nineteenth century a movement for the election of judges swept over the United States. In the name of "democracy" it desired to subject the courts to popular control, although leaving them free from executive control. This new political philosophy was based on the premises that the judge "should be elected as all other public officials were, that there should be rotation in judicial offices as in all others, that on the bench as elsewhere, in the public

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\(^6\) See footnote 15, supra.

\(^7\) *Journal of the Federal Convention* (July 18, 1787) 377.

\(^8\) *The Federalist, No. LXXVIII*, (Lodge, 1923) 483.
service 'to the victor belongs the spoils,' and that incredible as it may seem, too great a knowledge of the law might be a judicial handicap.'

Many of the states changed at this time from the appointive to the elective system and from life tenure to a period of years—an-where from two year terms as in Vermont to a twenty-one year term in Pennsylvania. Agitation was prevalent to extend this "reform" even to the federal judiciary as is seen from the message of President Johnson to Congress July 18, 1868, recommending a constitutional amendment by which the terms of judicial officers would be limited to a number of years. He says:—"It is strongly impressed on my mind that the tenure of office by the judiciary of the United States during good behavior for life is incompatible with the spirit of republican government, and in this opinion I am fully sustained by the evidence of popular judgment upon this subject in the different States of the Union. I therefore deem it my duty to recommend an amendment to the Constitution by which the terms of the judicial officers would be limited to a period of years." The change which President Johnson advocated did not come to pass. For the people never saw fit to apply to the federal judiciary the principle of popular election, despite the fact that one after another of the states, as we have seen, fell in line with this "democratic" movement.

Up to this point we have been concerned in our discussion with a general statement of the problems involved in the question of tenure and its bearing on the administration of justice. We have shown what is implied in the phrase, "administration of justice," its relation to law, and the function of those charged with the duty of administering it. We have designated those who are included among "judicial and administrative officers." We have discussed tenure with the related problems of personnel and method of selection. We have shown the present status as regards tenure of all charged with the administration of justice in the United States. We have touched on the history of the question of tenure. With this background of necessary information, we can now proceed to discuss the effects of the insecurity of tenure on the administration of justice.

It is always a difficult matter to isolate a particular cause, and assign to it a particular effect. Most effects are too complex and the result of too many contributing causes, to admit of the simplication of such treatment. This is especially true of a thing, such as the administration of justice, which is the result of the interplay of so many different forces. Any attempt to analyze the causes contributing to inefficiency

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20 Messages and Papers of the Presidents 643.
in the administration of justice would necessarily include a great number of influences.\(^{21}\) There is, however, a value in the attempt to isolate an individual cause, such as insecurity of tenure, and determine its effect, when we do it realizing the limitations that necessarily attach to any such effort. It is with this reservation, that we proceed with the attempt to determine in what ways the individual factor of insecurity of tenure is reflected in the administration of justice.

The case for insecurity of tenure is usually based on the following considerations. It is argued that it is more democratic. It was under the aegis of democracy, as we have seen, that the majority of the states changed from the appointive system with its tenure “during good behavior,” to the elective system with tenure restricted to a limited number of years. Another argument usually advanced is that judicial officers, who hold their office for a limited tenure, and are subject to reelection and reappointment, are in closer touch with the people, and less likely to balk popular legislation by their decisions. A third argument is that it eliminates the danger of a judge becoming autocratic, high-handed and overbearing in the conduct of his office, which results, it is claimed, frequently flow from the provision of tenure “during good behavior.”

While there is an element of truth in the above contentions, it would appear, at least in the case of the first two, that they proceed from a misconception of the nature of the function of the judiciary, and in particular, a misconception of the somewhat peculiar position of a judiciary in a government like that of the United States, which is established under a strict constitution. To say that the elective system is more democratic seems to imply that the judiciary is to be subservient to the will of the people. In reference to the second argument, the very purpose for the existence of judicial review of the constitutionality of acts of the legislature would be nullified, if it was intended that the judiciary would reflect the transitory desires of the majority. As to the last, even supposing that an individual judge should be unfaithful to his trust, that is no argument for changing any system of tenure, but rather should result in providing that system with an efficient and effective method of recall.

There is great dissatisfaction with the actual effects of insecurity of tenure, if we can judge from what authorities have to say about it. The growing demand for judicial reforms in the states led to the formation of the American Judicature Society in 1913. This organization advocates a simplification of legal procedure, longer tenure, better

salaries for judges, and some method of selection more satisfactory than popular election has proved to be. The Cleveland Bar Association learned, after several years of strenuous campaigning for candidates approved by the Association, that the elective system was fundamentally defective. Professor Charles T. McCormick in an article entitled *More Light on Judicial Selection*, in commenting upon the conditions existing in Chicago declared that "the collapse of the theory of selection of judges by the people is complete."\(^\text{22}\)

Before we turn to the consideration of the actual effects of insecurity of tenure, it is necessary to make a distinction in our treatment of the question between those who exercise the judicial function alone, and those who in addition to the judicial function, have quasi-legislative, and quasi-administrative powers. Some effects of the insecurity of tenure are common both to regular judges and to the members of administrative boards exercising judicial powers. Others, however, are peculiar to the members of the administrative boards. We shall consider first such effects as are common to both.

In our consideration of the ideal in the administration of justice, the requirement of impartiality stands out above all others. This, it would seem, is a *sine qua non*, an indispensable factor, in the exercise of judicial power. This impartiality in turn demands independence on the part of the judge. Without security of tenure there can be no independence. Even a superficial knowledge of the facts of human psychology, would lead inevitably to this conclusion. Human beings are so constituted that whether they will it or not motives of self interest enter into and color their thinking. "The wish is father to the thought" is not only a clever expression, but a deep truth of human psychology. It has led the noted psychologist, William James, to conclude that truth is ultimately nothing but what a man wills to believe. But while William James's *Faith Ladder* may satisfy the demands of a not too exacting pragmatic philosophy, it would be a poor substitute for the more objective type of truth, which we like to think of as forming the basis of judicial decisions. Insecurity of tenure places too many obstacles in the way of the judge in his efforts to arrive at the unbiased, impartial decision.

If we want to know how tenure of office operates to have a judge dependent on the power to appoint him—dependent for his continuance in that office or for his restoration to it—in short, dependent on everything, we need but refer to England prior to the Act of Settlement. The judge was merely the tool of the royal hand that made and unmade him. Since the enactment of the Act of Settlement, England has appointed its judges "for good behavior," and by reason of its civil

service has made "career men" out of its administrative officers. We, in America, under the cloak of democracy, claim to know the man—the judicial man—better than did the illustrious framers of the federal constitution. Instead of appointment "during good behavior," in all but a few instances, we appoint him for a period of years, or have him run for the office, under an elective system. The inevitable result of this insecurity of tenure flows necessarily from the very nature of man, in that he will administer justice, tempered by the desire or need for reelection or reappointment.

The second effect to be attributed to insecurity of tenure, is that it places a premium upon ignorance and incompetence in offices where these defects can least be tolerated. It makes it practically impossible to attract men having the qualities most necessary for these offices. There is no incentive for an able lawyer to give up his practice, which he has built up laboriously over a number of years, for a judgeship or administrative office for a period of a few years. He has reason to fear that at the end of his term, he will not be reelected or reappointed, and he will come down from the bench, an older man, with no source of income since his practice has disappeared in the meantime. To an even greater degree insecurity of tenure operates to staff administrative boards with poorly qualified officials, because there is no prerequisite of education or training, such as is required of judges. The situation is graphically set forth by President Dodds of Princeton in a recent article—"Except for posts in which technical qualifications are obviously indispensable, we adhere even today pretty closely to the Jacksonian doctrine, paraphrased by John Stuart Mill, that any man not fit to be hanged is fit for any office he can get." The appointments are usually made for political purposes, or on the basis of personal friendship, family relationship, or religious affiliations; in short for any reason other than the one important reason of ability and qualifications requisite for the position. As a result, all too often, judicial offices are filled by incompetent and untrained men, who look upon a public office as a reward for party loyalty or as a means of enhancing their personal prestige, rather than as an opportunity for public service.

The third effect of insecurity of tenure is that it places our judicial and administrative offices right in politics, where success or failure will be determined in the white heat of partisanship upon one's ability of getting or controlling votes. An individual who is not scrupulous about using any means to attain his office, cannot be expected to be over scrupulous in his conduct of the office, when he has attained it. Hence it is that insecurity of tenure very frequently breeds corruption in

office. This is, to be sure, the darkest side of the picture, but even at its best, the system is replete with danger for the administration of justice. "The judge who wants to keep his place must think of political consequences. He must shirk responsibility and hide behind the jury whenever he can. He must dodge every issue which might 'make somebody mad,' and, whenever he has to decide such an issue, put an ear to the ground and let the political forces decide for him. Indeed, the elective system does not tend to eliminate the unfit judge—its tendency is to eliminate the poor politician. Politics is a game, and those who play at it best are not the judges who are attending to business, but those who slap backs and know how to bend with the wind." Administrative boards are subject to an even greater degree to the subversive influence of politics. They are considered a legitimate field for the exercise of patronage. Only a very small percentage of the positions are subject to civil service requirements. Moreover, the very fact of the closeness of these boards to the people, entails a greater danger of favoritism and the granting of special privilege.

Thus out of this practice of insecurity of tenure there results a three-fold evil effect, dependency, ignorance and corruption in the ministers of justice. We cannot help but recall the apt words of Chief Justice Marshall on these evils. He said "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt or a dependent judiciary."

In addition to the evil effects enumerated above, administrative boards present a somewhat specialized problem of their own. The problem arises from the very point which makes for the efficiency of these boards, namely the fusion in a single office of the three functions of government—executive, legislative and judicial. The danger, which Montesquieu feared from such a uniting of powers, has not ceased to be a threat. He states:—"'When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.' Again 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control for the judge would be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.'"

A consideration of the evil effects of insecurity of tenure would be incomplete without some suggestions of means to eliminate them. One fact that would seem to be established beyond doubt, in the above

27 THE FEDERALIST, No. XLVII (Lodge, 1923) 303-3.
analysis, is the inadequacy of both of the prevailing systems of selection of judicial and administrative officers. The elective system, of course, falls with insecurity of tenure, for insecurity is inherent in the system of popular election. Of the appointive system, as practiced at the present time, it may be said that where it implies a term for a limited time, the same argument applies. Where appointment is made to last “during good behavior” it amounts to tenure for life, since impeachment has proved practically worthless as a means of ridding the bench of incompetent and unworthy judges.

In any system for the administration of justice, which the mind of man has or can conceive, there will always come to the surface the frailty of human nature, as personified by the individual jurist. We all seek after that system which gives us the highest degree of assurance that “taking man as he is, at his strongest and at his weakest, and in the average of the lot of humanity,” it will give us the best judge on every bench of justice. Since the end of any system is to achieve an almost God-like ideal of justice, and the instrumentalties for the attainment of that end are fallible, human beings endowed with an intellect and free will, as well as all the weaknesses of our human nature, temptation, or an opportunity of effecting a miscarriage of justice, must be removed, as far away as humanly possible, from the judges.

There is in each of us a motivating power or tendency, whether we call it a philosophy of life or not, which gives coherence and direction to thought and action. Throughout our entire life forces, which we do not recognize and cannot name, have colored our outlook on life and our conception of social needs. The philosopher, Roger Bacon, said—“There are four chief obstacles in grasping truth, which hinder every man, however learned,—namely, submission to faulty and unworthy authority, influence of custom, popular prejudice, and concealment of our own ignorance accompanied by an ostentatious display of our knowledge.” Every man is entangled in these difficulties—judges being no exception.

It is next to impossible to formulate a plan which would meet the needs of both the judicial and administrative officers. It therefore becomes necessary to sketch a plan for each. The proposed plans will not be complete in themselves, but rather be pliable enough to meet

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28 The Opus MAJUS of Roger Bacon—Translated by Robert Belle Burke, part I, c. 1, p. 4. Francis Bacon in his ADVANCEMENT OF LEARNING and in his Novum ORGANUM states that the deepest fallacies of the mind are idols. These fallacies are imposed upon the understanding by (1) Idols of the Tribe—the general nature of man; (2) Idols of the Den—the nature of each particular man; (3) Idols of the Market—word, or communicative nature; (4) Idols of the Theatre—false theories or philosophies. Of the four, the last is the easiest to set aside, while the others seize the mind strongly and cannot be eradicated.
conditions in an ever-changing society. As a preface to any plan, we state that we are not at present concerned with its constitutionality. If the same cannot be attained without constitutional amendment, then the evils which we propose to eliminate make it imperative for all liberty loving people to exert their best efforts to effect this end. We do not under any circumstances, hold out that these plans are self-conceived, but rather that they represent the thought and effort of many able lawyers. We have borrowed freely from their proposals and experience, hoping thereby to aid in the elimination of the present evils resulting from insecurity of tenure under the elective and appointive system.

At the time of the drafting of the federal constitution, the same question arose as to whether the judges should be appointed or elected. Benjamin Franklin then told the delegates what he understood was the practice in Scotland. The lawyers themselves nominated the judge and they always selected the ablest of the profession "in order to get rid of him and share his practice among themselves."

Any consideration of a plan guaranteeing security of tenure, also calls for a consideration of its corrolaries, namely method of selection and supervision of the judges. It is only through security of tenure that the independence of the judiciary can be achieved. Tenure should be made so certain as to attract competent and qualified men thereby once again making "the satisfaction of public effort greater than those of private gain."

Tenure does not only mean a remuneration sufficiently large to permit the judge to save something for his old age, but also a provision for removal or retirement with a limited pension when the judge becomes unfit to hold judicial office.

The administration of justice must be taken out of politics. The power to select men for judicial office cannot be vested in the executive, but with the chief justice. The executive will designate one of the associate justices of the supreme court as chief justice, who will preside for a period of time equivalent to a single term of the executive. Upon completion of his term the chief justice reverts to the rank of an associate justice, never again to have the honor, dignity and responsibility of chief justice. The chief justice can obtain the guidance of an advisory council composed of lawyers, executives, labor representatives and other classes, as to whom he should appoint. The responsibility for the appointment shall rest squarely upon the chief justice. This is in keeping with the proposal made by Alexander Hamilton,

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31 Tead, Amateurs vs. Experts in Administration (1937) 189 ANNALS 47.
when he said—"I proceed to lay it down as a rule, that one man of
discernment is better fitted to analyze and estimate the peculiar quali-
ties adapted to particular offices, than a body of men of equal or per-
haps even of superior discernment. The sole and undivided responsi-
bility of one man will naturally beget a livelier sense of duty and a
more exact regard to reputation. He will, on this account, feel himself
under highest obligations, and more interested to investigate with care
the qualities requisite to the stations to be filled, and to prefer with
impartiality the persons who may have the fairest pretensions to
them." The appointment shall be of a person under forty-five years
of age and for a probationary period of three years, at which time
the judge runs "on his record," no one opposing him when he accounts
to the people for his stewardship. If the people approve he is then
returned to the bench for another period of five years, when for a
second time he runs "on his record." He, then, remains on the bench
for another twelve years—or a total of twenty years—before he is
retired. His tenure should not be for life, since the older the judge
becomes, the harder it is for him to change his views with the change
in social conditions, thereby making it impossible for him to interpret
the law in the light of the needs of the generation. If he should become
disabled, incompetent or neglectful of his duties, he could be removed
upon a proper hearing had and a verdict of "guilty" returned. Upon
being retired the judge would not return to the general law practice,
but would receive a pension of approximately one-half of his salary.

Proper supervision of the judiciary, by the supreme and circuit
court judges, would really result in tenure being for good behavior.
If any judge should become arbitrary and high handed he could be
"toned down," by being under supervision. If the facts should justify
removal, the chief justice would have the authority to remove. Super-
vision should check most bad practices at an early stage, and almost
eliminate the need for removal.

This then, in brief is our plan for eliminating the three evils exist-
ing in the judicial system by reason of insecurity of tenure, namely
dependence, ignorance and corruption among the judges.

In reference to the proposed plan for security of tenure for admin-
istrative boards, the members thereof cannot be divorced entirely from
politics. Positions concerned with policy-forming activities should be
subject to party control, since policy formation is primarily a func-
tion of the political or elected officials of government. Administration
is, or should be, a non-political function concerned with the direction,
improvement and operation of the business of government. All the
members of boards which perform non-political functions, should be

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82 The Federalist, No. LXXVI (Lodge, 1923) 472.
placed under civil service. This administrative service should be open primarily to college graduates, who accept the appointment as a career, especially with opportunities open to them to advance themselves. Luther Steward in a recent article on *The Public Servant* stated that an employee’s will to serve “must be matched by opportunities for him to do so without political interference, without constant harassments due to uncertainty of tenure and without a haunting fear of the future. It must be matched by a system under which his loyalty and efficiency will be recognized and rewarded, surely and systematically, and by one which will attract and hold talent which is the equal of any the country affords.”

In addition to putting non-political board members under civil service, our plan also includes the establishment of an administrative court to effect independent review of the decisions of the many administrative boards. This would restore the constitutional guarantees to individuals, who otherwise are “defenseless against injustice at the hands of arbitrary, capricious or corrupt public officials.”

Some such reform as we have outlined above with its proviso of security of tenure would seem to be an indispensable feature of a judicial system whose aim is justice—justice, not merely “according to law,” but justice in its fuller and more complete significance, in which it is synonymous with the common good. The plan proposed cannot remove all the causes of dissatisfaction with the administration of justice but it will at least bring us a trifle closer to a realization of the “kingdom of justice on earth.”

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