

Danger in the Recall

FROM ADDRESS OF EX-PRESIDENT WILLIAM HOWARD TAFT,
BEFORE THE AMERICAN BAR ASSOCIATION, AT MONTREAL, CANADA.

"In a popular government, the most difficult problem is to determine a satisfactory method of selecting the members of its judicial branch. Where ought such power to be placed? It is a great one. It is said it ought not to be entrusted to irresponsible men. If this means that judges should not be men who do not understand the importance of the function they are exercising, or the gravity of the results their decision may involve, or do not exert energy and sincere intellectual effort to decide according to law and justice, every one must concur. But if it means that judges must be responsible for their judgments to some higher authority, so that for errors made in good faith they incur a personal liability, then we know from centuries of actual experience that the interest of justice, pure and undefiled, requires their immunity. Finality of decision is essential in every branch of the government, or else government cannot go on. This is as true of its judicial branches as of other branches. Therefore, somebody must have the final word in judicial matters, and the only question is who can best exercise this power. The answer to the question must be found in the real character of the function which the judges are to perform.

"There is a school of political philosophers today who say that there are no positive standards of right and justice, but that these vary with the popular will, and that we are to learn what they are from its expression.

"If right and justice are dependent on the votes of the electorate, and if what are known as individual rights are merely privileges held at the will of a majority, then the proposition that the judicial officer represents the people in the same sense as the executive officer, so that when the electorate majority differs from his judgment he ought to be removed, has some logical foundation. So, too, in this view, the proposition that the final decision of the courts shall be submitted on review to a popular election, has reason in it.

"But I shall assume, for the purpose of this discussion, that principles of right and justice and honesty and morality are not merely conventional and have a higher source than a plebiscite."

"There is a broad field for the proper exercise of legislative power in prescribing rules of human conduct, and it is the function of the courts to interpret them. This is the duty of trained lawyers who know the theory and purpose of government, who are familiar with previous statutes and who understand legislative methods of expression. Thorough study is required to enable a judge to know and understand the whole range of legal principles that have thus to be discriminatingly adapted and applied. Work of this kind requires professional experts of the highest proficiency who have mastered the law as a science and in practice.

"Where are we to get such experts?" asked Mr. Taft. "When a man of high character, ability, and intelligence is to be selected for

the chief executive office, the electorate can be safely charged with electing one from the necessarily few candidates who are sufficiently prominent. But what of the searching out in the large profession a best expert, the man with real learning, with judicial temperament, with keenness of perception, with power of analysis and nice distinction, with large technical experience? Can he be found better by election or by appointment? There can be but one answer to this query. The selection can be really popular without resorting to an election. The chief executive elected by the people to represent them in executive work does, in appointing a judge, execute the popular will. He can search among the members of the bar and can inform himself thoroughly as to the one best qualified. Generally he has sources of information, both of an open and a confidential character, and if he is not himself a lawyer or personally familiar with the qualifications of the candidates he has an attorney-general and other competent advisers to aid him in the task."

Mr. Taft pointed out that for these reasons in every country of the world, except the cantons of Switzerland and the United States the judges were appointed and not elected. Mr. Taft said that a comparison between the work of the appointed judges and of the elected judges showed that appointment in the long run secured a higher average of experts for the bench.

The principle of the short ballot which was much put forward nowadays by reformers, really limited the election by the people to the chief executive and to legislators, and delegates to the elected executive the appointment of all other officers, including the judiciary. The executive who makes the appointments was properly held responsible to the public for the character of his selections.

Ex-President Taft said that they had had many able judges of popular election. The judges, however, of great and able instances who had been placed on the bench by election were instances of the adaptability of the American people and their genius for making the best out of bad methods and was not a vindication of the system. It had though resulted in the promotion to the judicial office of other judges who have impaired the authority of the courts by their lack of strength, clearness and courage, and who have shown neither a thorough knowledge of the customary law nor a constructive faculty in the application of it. Mr. Taft added: "Paradox as it may seem, the appointed judges are more discriminatingly responsive to the needs of the community and to its settled views than judges chosen directly by the electorate, and thus because the executive is better qualified to select greater experts."

"The result of the recent tendency is seen in the disgraceful exhibitions of men campaigning for the place of state supreme judge and asking votes, and the ground that their decisions will have a particular class flavor. This is the logical development of the view that a popular election is the only basis for determining right and justice; but it is so shocking and so out of keeping with the fixedness of moral principles which we learned at our mother's knee, and which find recognition in the conscience of every man who has grown up under proper influence, that we ought to condemn without stint a system which can encourage

or permit such demagogic methods of securing judicial position. Through the class antagonism unjustly stirred up against the courts, fiery faction is now to be introduced into the popular election of judges. Men are to be made judges not because they are impartial, but because they are advocates; not because they are judicial, but because they are partisan."

Mr. Taft admitted that politics played a part in the appointment of judges, and that they were selected from the dominant party. He denied though that this had resulted in the political control of the courts because the control of the government had naturally changed from one party to another in the course of a generation and this has normally brought to the bench judges from both sides. In addition if the judges were made independent by the character of their tenure, the continued exercise of the judicial function entirely neutralized in them any possible partisan tendency arising from the nature of their appointment.

Mr. Taft said that the judges originally were subject to recall by the king. Judicial recall was a case of atavism and was a retrogression to the same sort of tenure that existed in the time of the Stuarts until its abuses led to the act of settlement securing to judges a tenure during their good behavior.

"The states which have elective judges have gotten along somehow through the political capacity of the American people and the force of public opinion to make almost any system work. Under the present system a judge is certain to retain his position for a few years, and during that time at least he is free from interruption or the threat of popular disapproval. This certainty of tenure, though short, conduces to the independent administration of his office. As he draws near another election and hopes to have another term, it is true that his courage and his impartial attitude toward issues that have any political bearing are likely to be severely tested. Because the country has survived a judiciary largely selected in this manner does not seem to be a very strong reason why we should proceed to increase the evil effect of the short tenure by making it merely at the will of the plurality of those of the electorate who choose to vote.

"Other benefits from the life tenure in its effect upon the judges who enjoy it are that it makes the incumbents give their whole mind to their work, to learn before he can become of the always being judges, and to take vows, so to speak as to their future conduct. They must put aside all political ambition. One of the great debts which the American people owe to Mr. Justice Hughes is the example that he set in the last presidential election when the most serious consideration was being given to making him the candidate of the republican party. He announced his irrevocable determination not to enter the political field because he had assumed the judicial ermine.

"The federal judges have the power which the English judges have. They are so far removed from politics or the fear of election that the counsel before them exercise only the authority which their eminence as lawyers justifies. Under state statutes, following the tendency to minimize the power of the court, the judge is greatly restricted in the exercise of discretion to free the issue before the court from irrelevant and confusing considerations. The jury trial given by the federal

constitution is the trial at common law given by a court and jury, in which the court exercises the proper authority in the management of the trial and assists the jury in a useful analysis and summing up of the evidence, and an expression of such opinions as will help the jury to reach right conclusions. All this tends to eliminate much of what almost might be called demagogic discussion which counsel are prone to resort to in many of the local state courts and which the state judge fears to limit, lest it be made the basis of error and a ground for a new trial under some statute narrowing his useful power. We must, therefore, weigh the frequent characterization of the federal judge as a petty tyrant in the light of the contrast between proper authority exercised by him and the control exercised by judges in state courts, where opportunity is too frequently given to the jury to ignore the charge of the court, to yield to the histrionic eloquence of counsel, and to give a verdict according to their emotions instead of their reason and their oaths. Why is it that every law-breaker prefers to be tried in a state court? One of the reasons may be found in the better organization of the federal prosecuting system. Why is it that the federal courts are the terror of evil doers? But is it not chiefly because the judge retains his traditional control of the manner of the trial and of the counsel and really helps, but does not constrain, the jury to a just verdict? Is it not because law and justice more certainly prevail there rather than buncombe and mere sentiment?"