Denver Law Review

Volume 14 | Issue 4 Article 2

July 2021

A Non-Partisan Judiciary

Robert L. Stearns

A NON-PARTISAN JUDICIARY*

By DEAN ROBERT L. STEARNS, *Colorado University School of Law, Denver, Colorado*

ANY discussion of the subject of judicial selection necessarily implies that the profession is not satisfied with the present method of choosing our judiciary. It does not necessarily carry the assumption, however, that all of the defects of the administration of justice are to be blamed upon the judges. There are unquestionably many such defects, of some of which the public complains, of some of which the bar complains, and of some of which the judges themselves complain. But the public, the bar, and the bench must all share the responsibility.

Moreover, the general discussion of this subject does not necessarily imply that there is general inefficiency among the members of the bench. True there are some judges on the bench who ought not to be there. But you know and I know that most of the judges are well qualified for their work, discharge it conscientiously, with the result which is in the main satisfactory. But even the best of them are seriously handicapped in the performance of their duties by the system which we employ in their selection and maintenance.

A consideration of the problem, therefore, should carry no odium or stigma, but indicates an awakening of the public consciousness to a problem of general social concern, and we all know that the agitation of thought is the beginning of wisdom.

There are three great problems which the profession has faced for generations and undoubtedly will continue to face for many generations to come. The first relates to the technicalities and inefficiencies of procedure. The second concerns the intellectual and moral standards and qualifications for admission to the bar. The third concerns our subject today of judicial personnel and methods of selection. These problems of the social order are like problems of public health —they are always with us and when we think we are making progress in one line, a new disorder appears which we had not anticipated.

*Address delivered October 9, 1936, at the annual meeting of the Missouri Bar Association in Kansas City, Mo. Reprinted from November, 1936, issue of the Missouri Bar Journal.

The first of these ever-recurring problems to be faced by the profession was the improvement of procedure. The lawyers had become so wedded to the old inherited system of common law pleading that it took generations of adjudication and legislation to produce the reform resulting in our Codes of Practice and Procedure. However, salutary this reform may have been, it resulted in new problems and difficulties which are almost as fundamental and serious as the original difficulty sought to be corrected. As the result we have today a system of practice while undoubtedly an improvement over the original, is by no means a satisfying system. One of the two major consequences of this reform flows from the fact that because legislation has been resorted to, the judicial initiative and energy has been sapped and many judges even doubt the existence of their inherent rule-making power and decline to correct patent defects without first obtaining legislative sanction. I for one feel very strongly that this situation is the root of much of our present dilemma. Another consequence of this reform of procedure again relates to the necessity for legislation, and whereas New York and California, which first adopted the Field Codes, have by the same legislative device so amended the codes thus adopted that the original simplified procedure is hardly recognizable.

In the second major problem—that of standards for admission to the bar—we have made and are making some progress, but we have yet a long way to go. Most of the states have adopted minimum standards for legal education promulgated by the American Bar Association. More are following each year, but we still have shysters and pettifoggers, and disbarments are not yet a thing of the past and possibly will not be.

My point is that these are social problems and are dependent for their successful solution not upon a formula, but on the human element of the eternal vigilance of an idealistic and energetic group.

Such work is the nature of our problem of judicial selection and personnel. While we may work out a solution that looks well on paper, it can only succeed if the lawyers and the public generally are constantly aware of the fact

that in selecting judges they are selecting human instrumentalities and they must regard not only the letter, but the spirit embodied in any intelligent system of judicial selection. "The spirit giveth life."

No nation has an ideal system of selecting judges. We are constantly cited to the example of England in matters concerning the administration of justice. But in England the selection is purely a political matter. In commenting upon this phase of the subject before a conference such as this, held by the lawyers of Ohio in 1934, Professor Edson R. Sunderland of the law faculty of the University of Michigan, stated as follows with reference to the English Judiciary:

> "All judges are selected by political party leaders and they are selected among those who have rendered political services to the party. The Prime Minister, the head of the party in power, selects the so-called titled judges—the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, and the President of the Admiralty, Divorce and Probate Division. He selects the five Lord Justices of Appeal, and the seven Law Lords of the House of Lords. The Lord Chancellor, the political appointee of the party, selects all the county judges and the ordinary judges of the High Court. The Home Secretary, another political appointee of the party, selects all the paid magistrates who try the criminal cases throughout England."

Thus, says Professor Sunderland, the whole system is a strictly political arrangement for political appointment of those entitled to reward for political services. And yet, the judges, when so appointed are very satisfactory. Why? Well, they have their own special remedies and safeguards. In the first place ability is obtained by the distinctive institution of the barrister class in England. The barrister is a specialist in court procedure. He spends substantially all his time in court. The leading barristers are consistently competing with one another before the public eye. The lawyers know who the best men are; the judges know and the public knows. It would be politically very unwise to pass over these men in the matter of judicial selection and choose men of inferior ability as everyone would be aware of what was done. Hence even though politics is at the root of the system, the judicial appointments are good.

But why do these men want the office? First, the salaries are adequate. As Mr. H. G. Wells has said they "pay

them enough to make them individually incorruptible." Second, the English Judge has a permanent tenure of office. Once seated, he is there for life or during good behavior and has no need of political maneuvering to maintain his office. Third, there are practically no promotions from a lower to a higher court. Promotions are so few that no English judge ever counts on them. When he takes his position on the bench, he takes it as a life career and has no need for political jockeying for promotion. His only function, and function enough it clearly is, is to discharge his duty and conduct his court as befits the tradition of the Anglo-Saxon judiciary.

In France the situation is entirely different. There is no politics in the original appointment of judges because the Judicial Department of the Government is a civil service which men enter in their youth as our young men enter the bar. They choose the judiciary as against the bar as a life career. Long preparation and severe tests are applied, and when these men enter the judicial profession they enter it at the bottom of the ladder. They are given small appointments at first, and these offices gradually increase in importance as the occupant is moved from one position to another during his entire judicial career, but politics is the basis of the system involved. If a French judge desires promotion, he must keep in touch with those who have political power, with the Minister of Justice at the head, for advancement depends not only upon his ability, but upon his standing with those in government authority who are politically selected.

I have mentioned these two situations in order that we may have them in mind when we discuss the situation in the United States today. Here we have no barrister class and we have no judicial civil service. Our problems are peculiar to ourselves, and we must answer them in our own way. Ours is a democracy—admittedly one of the most difficult forms of government to maintain—but in the light of the spectacle of modern continental Europe, I for one regard it as the hope of our civilization.

It is interesting to note that the elective system for judges obtains in only one other country, namely: Switzerland. Moreover, it has not always been the system in this country. The appointive system existed in all the original

colonies in the first instance, with the exception of Georgia. About 1830, however, a definite trend of sentiment for the popular election of judges swept over the country. Mississippi was the first of the appointive states to employ the elective method, and thereafter practically all of the states followed the elective plan.

Thirty-six states now elect their judges in some manner. Thirty-two elect them by partisan ballots. These are Alabama, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana, Michigan, Missouri, Maryland, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Texas, Utah, and West Virginia. Thirteen states now use some form of non-partisan ballot. These are Arizona, Idaho, Minnesota, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Washington, Wisconsin, and Wyoming. Wisconsin not only uses a non-partisan ballot, but holds a separate election for judges on the first Tuesday in April. New Jersey conforms closely to the federal system. The appointments are nominated by the governor and confirmed by the state senate. In Maine, Mississippi, and New Hampshire, the governor appoints, but a council confirms the appointment. In Connecticut the legislature selects on the nomination of the governor. Rhode Island, South Carolina, Vermont and Virginia, the legislature selects without nomination. In Florida, justices of the supreme court are elected while circuit judges are appointed by the governor and confirmed by the senate. In Mississippi, the reverse is true, and the governor nominates justices of the supreme court and the senate confirms, while judges of the circuit court are elected.

Thus we see in most of our states a system of popular election at periodic intervals. We are today questioning the desirability of this system because of the evils incident to political preferment and the lack of efficiency which the system imposes on the judges who must from time to time go before the people and face a re-election As a result of this dissatisfaction, numbers of our states are experimenting with different devices in the matter of the selection of judges. One of our great strengths lies in the fact that we have forty-eight separate laboratories for social experimentation, and it

is to the results of the experiments from these laboratories that we must look for improvement in the solution of our social and local governmental problems.

Accordingly it would seem desirable for us to examine some of the systems which have been suggested by various states in attempting to cope with the problem of judicial selection.

Only yesterday the Judicial Council of the State of Missouri in a report submitted to the Supreme Court of this State made some very pertinent observations and submitted some recommendations striking at the evil of political partisanship and competitive elections in the choosing of judges. I quote one or two paragraphs from this report as it appeared in the press:

JUDICIARY RECOMMENDATION

Regarding the council's judiciary recommendation, the report says:

"We are persuaded that more care and deliberation must be given to the selection of judges. We feel that whatever success has attended the selection of judicial candidates by the primary method has been in spite of the many and obvious defects of that system and not because of its merits.

"We do not recommend a departure from choosing our judges by election, but we do strongly favor the nomination of judges for the supreme court, courts of appeal and circuit courts by conventions, composed of delegates from the state at large, or the districts or circuits, as the case may be, at which no other candidates shall be nominated for office, no party platform adopted and no business of any character transacted except the nomination of judicial candidates."

"In our judgment, the selection of candidates for judicial position by the primary method has not remedied the evils of the convention system, but has produced new and additional defects.

"The spectacle of a candidate for judicial office going from place to place soliciting votes is humiliating. The spectacle of a man old enough, experienced enough, wise enough to be selected judge, being compelled to spend months, at great expense, going from county to county soliciting votes

in an effort to obtain a nomination to that office is to cheapen and degrade the office. That neither the bar nor the public is able to 'draft' a man of high attainments who might accept the office, but is not willing to enter into a scramble to obtain it, is enough to condemn the system.

BAN POLITICS IN SELECTING JUDGES

"Furthermore, we feel that the selection of judicial candidates should be divorced, as far as possible, from party politics. Such nominations should not turn upon the partisan attitude of the candidate, but upon his fitness for judicial office.

"The system of judicial conventions is not new in Missouri. It has been in existence before. We have, therefore, concluded, after most thoughtful and deliberate consideration, to recommend that all candidates for judicial office, including circuit judges, judges of the courts of appeals and judges of the supreme court, be nominated solely at party conventions called and held for that purpose alone."

It is very interesting to note, however, that your judicial council recommends in favor of retaining the elective system. By virtue of their very nature and training lawyers are fundamentally conservative and instinctively oppose any modification of the existing order. You will recall that Massachusetts from its earliest days has had the appointive system of selecting judges who hold office for life or during good behavior. In 1853 a convention was held in that state at which a modification of the State Constitution was under consideration. Many of the delegates favored a plan for selecting judges by popular election and reducing their tenure. In opposing that proposal in one of the most outstanding addresses of his distinguished career, Mr. Rufus Choate said:

"Sir, in this inquiry what mode of judicial appointment, and what tenure of judicial office, you will recommend to the people, I think that there is but one safe or sensible mode of proceeding, and that is to ascertain what mode of appointment, and what length and condition of tenure, will be most certain, in the long run, guiding ourselves by the lights of all the experience and all the observation to which we can resort, to bring and keep the best judge upon the bench. . . . the

best judge for the ends of his great office. There is no other test. That an election by the people, once a year, or an appointment by the governor once a year, or once in five, or seven, or ten years, will operate to give to an ambitious young lawyer (I refer to no one in this body) a better chance to be made a judge . . . as the wheel turns round . . . is no recommendation, and is nothing to the purpose. That this consideration has changed, or framed, the constitutions to some of the States whose example has been pressed on us, I have no doubt. Let it have no weight here. We, at least, hold that offices, and most of all the judicial office, are not made for incumbents or candidates, but for the people; to establish justice; to guarantee security among them. Let us constitute the office in reference to its ends.

"I go for that system, if I can find it or help find it, which gives me the highest degree of assurance, taking man as he is, at his strongest and at his weakest, and in the average of the lot of humanity, that there shall be the best judge on every bench of justice in the commonwealth, through its successive generations. That we may safely adopt such a system; that is to say, that we may do so and yet not abridge or impair or endanger our popular polity in the least particular; that we may secure the best possible judge, and yet retain, aye, help to perpetuate and keep in health, the utmost affluence of liberty with which civil life can be maintained, I will attempt to show hereafter. For the present, I ask, how shall we get and keep the best judge for the work of the judge?"

Mr. Choate then proceeded to consider one by one the arguments submitted by the proponents of the elective method and demonstrated, obviously to the satisfaction of the convention, that the appointive system should be retained.

I mention this incident because when we consider any modification of the existing system we must not do so lightly or inadvisedly but soberly, advisedly and in the light of experience and wise counsel. I commend Mr. Choate's entire address to any group of lawyers grappling with this problem.

But let us also look at the contemporary scene. Other states in our national union are facing and solving this problem. What steps are they taking?

In the Journal of the American Bar Association for last February Mr. Paul H. Sanders, Assistant to the Director to the National Bar Program gives a very clear analysis of the current proposals in the matter of the choice of judges.

The first revolt in the present movement against an elected judiciary occurred in California, where the rapidly growing population and the increase in the amount of litigation resulted in a critical congestion of the processes of judicial administration. In 1932 this condition brought about an increase in the number of the judges of the general trial court in the City of Los Angeles alone to fifty. In order for these judges to retain their positions, it became necessary for them to devote from twenty-five per cent to forty per cent of their time to political activities such as meetings, speeches, radio addresses, etc. Public dissatisfaction with the handling of judicial business was widespread. As a result of this dissatisfaction, a former judge of the Supreme Court, John Perry Wood, assumed the burden of starting a movement for a change. This movement gained support and was allied with other similar movements of dissatisfied individuals and organizations. Without discussing the details of how the change was brought about, suffice it to say that as a result of this agitation, a measure was drafted and by a petition was placed on the ballot for the adoption of a constitutional amendment, which amendment in outline form is as follows:

"(1) An immediate change is made as to supreme and appellate judges. Hereafter, when a vacancy occurs in those courts the governor appoints a successor, subject to confirmation by a commission on qualification, consisting of the Chief Justice of the Supreme Court, a justice of the District Court of Appeals, and the Attorney General. The justice thus appointed holds until the next biennial general election when his name goes on the ballot with the question 'Shall Judge Blank be elected to the office?' If elected, he holds for the regular terms, after which his name comes up again in like manner. If not elected, the governor fills the resulting vacancy in the same way. The only way to get on the bench is by the governor's appointment.

(2) As to the judges of the general trial court, no immediate change is made, but the people in each county may, by a majority vote, adopt the new system provided for appellate judges, as the mode of selection of trial judges in that county."

To me the most interesting phase of this plan is the feature which requires the appointed judge at the next election to

run without competition except as against his own judicial record.

A recent act of signal importance has occurred in the state of Ohio. The bar association of that state at its annual meeting in 1935 approved a plan which provides that in case of the vacancy in the Supreme Court, a judicial council, consisting of the Chief Justice of the Supreme Court, a judge of the Court of Appeals, a judge of the Common Pleas Court, a municipal judge, a probate judge and three practicing lawyers be appointed by the governor and shall submit to the governor a roster consisting of not less than three nor more than five names; that the governor shall make appointment from the list thus furnished and that the appointment shall be confirmed by the senate. At the end of the term fixed by law the record of the judge is submitted for approval or disapproval, similar to the plan originating in Georgia. It is interesting to note that the Ohio Bar Association voted its approval of this suggestion by a majority of 209 to 72.

The plan proposed by the Dade County Florida Bar Association involves the selection of judges other than Supreme Court judges by the Chief Justice of the Supreme Court, which is to be followed by a confirmation by the other justices of the Supreme Court. It is clear, however, that such a plan, in order to guard against a very patent danger, should provide that the appointive officer is himself to be elected and thus made responsible to the will of the people. As I take it, the essential quality of a democracy is to keep the selection of our public officers out of the control of any single individual or continuous group, thus enabling us constantly to draw our personnel from the reservoir of material which is constantly coming to the front as a result of the continuous process of individual competition and individual development. The great danger of our system lies in the circumstances which requires a candidate who is willing to devote himself to the public service, to seek his own re-election by competing with men oftentimes inferior in ability but more resourceful in the business of gaining popular support.

This subject has engaged the attention of the lawyers of the state of New Mexico for the past two years. At its meeting in 1935, the subject was presented in an illuminating

address by Judge C. M. Botts. His address so challenged the attention of the association that prompt action was evoked. A resolution was adopted empowering the president to appoint a committee to be charged with the duty of giving a further study to the problem. That committee reported to the association at its meeting in 1936 and presented to the association a complete summary of plans which have heretofore been employed in other states, as well as those which are now under consideration in many more, and outlined a program for the coming year whereby the best of the suggested devices be subject to further scrutiny and discussion, not only by the lawyers, but by other organized groups throughout the state. One of the interesting suggestions considered by the lawyers of New Mexico provided for the creation of a judicial council to consist of the chief justice of the Supreme Court, the attorney general, the president of the state bar association, and four outstanding laymen from different parts of the state to be selected by these three. In case of a vacancy in the office of the justice of the Supreme Court, the council thus created shall submit a list of five names to the governor from which he shall make an appointment, the appointment shall then be submitted to the members of the bar association for a vote by secret ballot on approval or disapproval. If the appointment is disapproved, the governor shall make another selection from the list. In the case of a vacancy in the office of district judge, the council shall submit a list of three names to the governor from which an appointment shall be made, and this proposal shall be subjected to the same referendum vote of the members of the bar association. The committee realized, however, that such a proposal would necessitate a constitutional amendment, and accordingly suggested certain interim improvements in the business of selecting judges which could be made by a statutory amendment to the end that the selection of judges could be made with less consideration of party affiliation. The committee concluded its report with the statement that further study was needed but quite obviously felt that progress had been made in letting the lawyers and the people realize that there is nothing sacrosanct about the present system and that if it has outlived its period of usefulness, it might well now be amended.

Thus there is definitely observable throughout the country today a ferment of thought concerning judicial selection. Each state must solve its own problem, but is doing so wisely by considering the suggestions made and plans adopted by various other states which have already taken the lead.

But whether we consider the California, the Ohio, the Florida, or any of the other plans, certain principles appear constant in all of them and properly so, because one of the great strengths of any democratic government lies in the purity of its courts and the integrity and independence of the judges selected to sit on them. It seems desirable to remove our judges from the necessity of political competition, a necessity which is itself repugnant to our most qualified men, and at the same time a cause of serious interference with the uninterrupted performance of their judicial duties. But on the other hand, this selection must not be so far removed from the will of the people that we destroy that ever-present responsibility for the administration of public office, which is the ideal of democracy.

The perfect system has not yet been evolved by any means. The last word has not yet been said. A plan which might work satisfactorily in one community might by reason of local consideration be a total failure in another. The administration of justice is a science and an art which can only be attained by human instrumentalities, and whatever system is employed must depend for its efficacy upon two great human qualifications; first, the caliber of the men selected, and second, the support and consent of an enlightened public opinion. In the last analysis we are dealing with men, and we are dependent on them, as well as on the system which we employ for the adequate administration of justice.

The qualities which the British poet, Sir William Jones, himself a famous law writer, ascribed to the state over one hundred years ago, are equally applicable today, to that great instrument of the state, the system of the administration of justice. You will recall his lines:

"What constitutes a state?
Not high-raised battlements nor labored mound,
Thick walls nor moated gate,
Nor cities proud with spires and turrets crowned

Nor starred and spangled courts,
Where low-born baseness wafts perfume to pride.

But men, high-minded men,
Men who their duties know,
But know also their rights,
And knowing, dare maintain them."

MEETING OF HOUSE OF DELEGATES OF AMERICAN BAR ASSOCIATION

By G. DEXTER BLOUNT, *of the Denver Bar*

A NEW constitution was adopted by the American Bar Association at its annual meeting in Boston in August, 1936. The principal object was to make the Association more truly representative of the practicing lawyers in this country. As one of the means of accomplishing that result the new constitution provides for the creation of a House of Delegates and invests the House of Delegates with exclusive authority (subject only to referendum to the membership on certain questions) to formulate the policies and to control and direct the administration of the affairs of the Association.

The House of Delegates is composed in part of a State Delegate from each state representing the members of the Association in that state, a State Bar Association Delegate representing the principal State Bar Association in each state, a delegate from each of certain large local Associations, the Board of Governors, consisting of one Governor from each of the ten United States Judicial Circuits, the President and Treasurer of the Association, the Editor of its Journal and a delegate from each of certain similar organizations such as American Law Institute and American Judicature Society. Altogether, the delegates directly represent a total of about 90,000 of the 175,000 lawyers in the United States.

The first meeting of the House of Delegates (except a preliminary organization meeting held at Boston immediately