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HAS WYOMING A PROBLEM IN JUDICIAL SELECTION?

BURTON S. HILL*

During colonial times in this country England provided the colonies with judges selected under its appointive system. For the selection of its own judges it had been using the same system for centuries. But it was not a new system even when England commenced using it. The system was then as old as history itself. It was virtually the same system recognized by King Hammurabi, the great Babylonian law-giver, about B. C. 2100. For when his other duties became too arduous to hear cases himself, and when he became dissatisfied with the royal priests as dispensers of justice, he sought men learned in the law. These men he appointed judges and bade them hold court at the great gate and in the market places of Babylon. Here his courts were accessible to the people.¹

And, as related in an article by Glen R. Winters, Editor of the Journal of the American Judicature Society,² the system was still in effect seven centuries later by wise King Haramhab, ruler of the Nile. As Egypt flourished under Haramhab he eventually learned his many pressing duties would not permit him to hear legal cases. But he solved the world-old problem by appointing competent judges. "I have sailed and traveled throughout the land," he wrote in his often quoted edict, "I have sought out two judges perfect in speech, excellent in character, skilled in penetrating the innermost thoughts of men, and acquainted with the procedure of the palace and the laws of the court. I have set them one in each of the two capitol cities, North and South." Further he said, "And I the king have decreed this, that the laws of Egypt may be bettered, and that suitors may not be oppressed."³

Two hundred years later, after Moses had delivered the Children of Israel from the harsh rule of the Pharaohs, he became over-wrought with his responsibilities as their leader. It was then his wise father-in-law, Jethro, said unto him, "The thing that thou doest is not good. Thou wilt surely wear away, both thou and this people that is with thee, for this thing is too heavy for thee; thou are not able to perform it thyself alone." And Moses hearkened unto Jethro and selected wise judges to administer justice. Those he appointed judged the people at all seasons, and brought only the very important cases to Moses.⁴

* Vice President of the Wyoming State Bar, practicing in Buffalo, Wyoming.

1. John H. Wigmore, "A Panorama of the World's Legal Systems," Vol. 1, p. 73. Hereafter referred to as "Wigmore".
2. Glen R. Winters, *Secretary-treasurer of The American Judicature Society*, "Selection and Tenure of Judges," appearing in *The Legal Intelligencer*, Philadelphia, June 13, 1947, being an address delivered before the sixty-fifth annual meeting of the Bar Association of the State of Kansas, Jayhawk Hotel, Topeka, May 23, 1947. Hereafter referred to as "Winters, Selection and Tenure". The writer is indebted to Mr. Winters for many timely suggestions during the preparation of this article.
3. Wigmore, 15.
4. Wigmore, 109, Bible, *Exodus*, Ch. 18.

At a later period the Jewish people came successively under the suzerainty of Persian, Greek, and Roman rulers. They maintained, however, a highly developed judiciary. Its high court, which adhered only to a senate called the Great Synhedrion, selected its judges and supervised its courts. Courts were set up in every town and village. Each judge had his assistant or junior, and as vacancies occurred the juniors were often appointed to take the judge's place.⁵

Under the Greeks a lay jury system appeared which was responsible for the administration of justice. There were no presiding judges. There were, however, magistrates learned in the law who supervised the proceedings. They held their positions by appointment from the state, but the citizens of the whole courts were judges of law and fact. After the evidence was in, and the speeches were made, without further deliberation each member of the court cast his ballot in a verdict urn and departed.⁶

But at a later period under the Roman emperors lay juries disappeared. Most trials, both civil and criminal, took place under a single judge, or praetor, who was of senatorial rank. His appointment came from the emperor, to whom he adhered closely. The emperor occasionally heard and decided cases himself, but every provincial city, from Britain to Palestine had its own praetor subject to the emperor's prescripts.⁷

Following the same familiar pattern, the early kings of England themselves were also judges. They were the fountain of English justice and held court in the Royal Palace. They alone decided questions of law and fact, and passed judgment in both civil and criminal cases in a court known as the *Curia Regis*, or King's Bench.⁸ But during the reign of Henry II, as it had been with Hammurabi, Haremhab, Moses, the Jews, the Greeks and the Romans, the King's sovereign duties became too burdensome to hear cases. Thereupon, the king decided to send judges out into the various counties to hear cases. These judges were of course chosen by the Crown. Men of learning and with judicial ability were selected for these high positions. And, in the hands of an able and conscientious ruler, judicial selections were so well made that in the early period of the British Empire the system became established. Yet, even so, improvements and betterments became necessary when it was learned that some judges appeared willing to cooperate with a scheming and capricious ruler. Moreover, before the *Act of Settlement of 1700* English judges were dependent upon the king for their salaries and tenure in office. This so influenced their decisions that by the Act, it became the duty of the Lord Chancellor to recommend the selection of judges. These selections were made to the sovereign through the prime minister.⁹

5. Wigmore, 113.

6. Wigmore, 291.

7. Wigmore, 415.

8. Winters, Selection and Tenur.

9. "Elements of Judicial Selection," A. B. A. Journal, Vol. 24 (1938) 542; René A. Wormser, "The Law," pp. 249-252.

As a consequence of this traditional method, which was the only one known at the time, it may not appear surprising that following independence the American Government adopted the appointive system. For the same reason several of the new states passed laws leaving the selection of judges in the hands of their governors. Even though some of the royal judges in the American colonies had been treacherous and unworthy, our early law makers were not content to cast off the English system. However, as a result of many baneful experiences with the royal judges, both the Federal Government and the state governments adopted safeguards. This was done when the Constitution of this country provided for the appointment of Federal judges by the president, by and with the consent of the senate. And as for the states, judicial appointments were made subject to the approval of some delegation or group of citizens. In *Pennsylvania* and *Delaware* this was the legislature. In *Massachusetts*, *New Hampshire* and *Maryland* it was the governor's council, and in *New York* a special council of appointment consisting of the governor and certain members of the legislature.¹⁰

However, not all of the first colonies to attain statehood followed the example of their sister states. It appears that a number of them considered it wiser to entrust the selection of judges to the legislature. In this category were the states of *Connecticut*, *Rhode Island*, *New Jersey*, *South Carolina*, *Virginia* and *Vermont*.¹¹

Of course, as might be expected, later changes were deemed necessary in most of these states. As a consequence, all judges are now appointive by the executive, subject to confirmation by a body such as the senate or governor's council, in the *District of Columbia* (the same as all Federal judges), *Massachusetts* and *New Hampshire*. The same is true with only minor exceptions in *Delaware*, *Maine* and *New Jersey*, while in *Rhode Island* trial judges alone are so appointed. With these states may now be included *California* and *Missouri*, since in recent years both have adopted a composite plan, having many of the elements of an appointive system later to be discussed. However, under these systems only appellate judges and certain others are appointed under a modified plan. All remaining judges are elected.¹²

Also in this group should be included several other states where various classes of judges are appointed, and some of considerable importance. In *Florida*, as one of these, circuit judges and judges of criminal courts of record are appointed by the governor, subject to the confirmation of the senate. In *Georgia* the governor appoints some city court judges. This is also true of judges of the municipal court of Indianapolis, Indiana. City judges, magistrates, and some county judges are appointed

10. Winters, *Selection and Tenure*.

11. "Judicial Selection Roundup," *Jn. Am. J. Soc.* 31, Dec. 1947, No. 4; Arthur T. Vanderbilt, "Minimum Standards of Judicial Administration," pp. 8-10. Hereafter referred to as "Vanderbilt."

12. Vanderbilt, p. 6.

in *South Carolina*, as well as municipal court judges in *Vermont*. In *Louisiana* some of the municipal court judges are named by city councils, and in *New York* judges of certain local courts are appointed by the mayor. Also, the governor appoints members of the Court of Claims in *New York*. And the same is also true of special superior court judges in *North Carolina*. Likewise in *Texas* the three-judge elected Court of Criminal Appeals may appoint a two-man commission of criminal appeals to assist in its judicial business.

At the present time *Connecticut* judges are elected by the legislature upon nomination of the governor, except probate judges and justices of the peace. In *Rhode Island* the same is true of all appellate court justices. In *South Carolina* all circuit judges and supreme court justices fall in this category. In *Vermont*, judges of the supreme and superior courts are so selected, and in *Virginia*, as for circuit and appellate court judges, the system is similiar.¹³

The state of *Georgia* became the first to adopt the principle of popular election of judges. The change occurred in 1793 when that state became dissatisfied with the system of judicial appointment by the legislature. However, during the succeeding thirty years many of the older states took the same course. And, as the new states were admitted to the union they all adopted the elective system. Although *Mississippi* resisted the change, it finally discarded the appointive system and adopted the elective system in 1832. The state of *New York* did likewise in 1846. Actually, at the time the Civil War broke out, judges were elected in twenty states of the then existing thirty-six. Today the elective system is employed in thirty-eight out of the forty-eight states.¹⁴

Whatever other causes may be assigned to have persuaded so many of the states to adopt the elective system, it is generally conceded the main cause was the so-called "Jacksonian Revolt." This took place in the 1820's when Andrew Jackson, while president, popularized the election of judges for short terms. It was his theory that a judiciary to serve during good behavior should be supplanted by one where judges could be popularly elected through partisan nominations. He reasoned that terms should be short out of deference to the new political doctrine of rotation in office expressed in the slogan, "To the victor belongs the spoils."¹⁵

During the Jacksonian era lawyers had little standing and less popularity. Jackson adhered closely to the theory that all men are created equal. He maintained that since lawyers were men, they all were on an equal basis, so that no particular lawyer was any more entitled to be a judge than any other, if the voters so willed. The qualifications of one lawyer as compared to another was not considered as important. The

13. Vanderbilt, pp. 8-9.

14. Winters, Selection and Tenure.

15. Vanderbilt, Introduction xxiii; Journal Am. Bar. Assn., Vol. 24, (1938) 542.

important thing was to keep every judge "close to the people" by a system of shorter terms so all might have a chance.¹⁶

Although the system of electing judges by popular ballot has been employed in this country for more than a century, it has always had its severe critics. Almost from the beginning it was found that many times the best qualified individuals were not elected. And this often occurred in the selection of judges for the highest positions where learning, judicial temperament and profound integrity were vitally important. Moreover, it was shown that too many times partisan politics played an important roll in the elections of judges, and occasionally a sinister one.¹⁷ This especially has existed in some metropolitan areas where the candidates have been little known to the electors. In these instances the candidate with the most effective machine would usually win. His opponent may have been the best qualified by standards of the better lawyers and the bar association, but he may not have had the same personal appeal. In many instances the high moral and professional standards of some candidates would not allow them to put on a spectacular and showmanlike campaign like their opponents. As a consequence candidates have been elected who were popular, but who lacked a knowledge of the law, and other judicial qualifications.¹⁸

However, results have been much more favorable in the less metropolitan areas. Here the elective system stands in a more favorable light, since in jurisdictions of less population the electors have a better opportunity to become acquainted with the candidates. And of course when this happens, they are less inclined to the alluring and persuasive appeal of candidates more adept at politics than at the law. Yet in large centers the electors may never even see the likeness of the various candidates except by viewing their pictures tacked on a telephone pole. Then when it comes to election day they are confused by the long list of judicial candidates to select from on the ballot.¹⁹

But in a state like Wyoming the aspirant for any judicial position would no doubt be pretty well known everywhere. Moreover, the candidates would likely be so few in number for any judicial position that even a casual inquiry would bring out the qualifications of all of them. But whether it is in Wyoming, or in any jurisdiction where judges are elected, from time to time even the best qualified and most respected incumbents and aspirants must stand election. To remain in office, even those incumbents who have arrived at that enviable station where they have little fear of succeeding elections must nevertheless occasionally test

16. Schlesinger, "The Age of Jackson," pp. 15-16 (1946); Vanderbilt, p. 4; Journal A. B. C., "Elements of Judicial Selection, Vol. 24 (1938) 542.
17. "Let's Have Competent Judges," *The Reader's Digest*, Nov. 1948; Robert N. Wilkin, "The Error of Electing Judges," *Tennessee Law Review*, Vol. 14, pp. 528-534.
18. *Duke Bar Assn. Journal*, Vol. 8, (1940) 2; Justice Henry T. Lummus, "The Trial Judge."
19. Lawrence M. Hyde, "Selection and Tenure of Judges," *Journal A. B. A.*, Dec. 1941, pp. 763-765.

the whim of the voters. And in such cases the incumbents must usually depend upon the good will of particular lawyers, the political leaders, the press, and the widespread publication of their names before the people. This has caused some authorities to believe that such tactics must eventually have some influence upon the judicial conduct of the judges seeking election.²⁰ It is the view of many of these authorities that under the elective system even the strongest and most virile character must sooner or later allow his judicial action to be unwittingly guided by self interest.²¹ Although, statistics carefully gathered, tend to bear out that elected judges generally have the confidence of a great majority of the electors, and are considered fair, honorable and unbiased.²²

However, the appointive system too, appears to have its imperfections, and its critics. While no doubt this system had generally produced competent and upright Federal Judges during the past century and a half, politics have nevertheless been in evidence. Senator Alexander Wiley, as chairman of the Senate Judiciary Committee some time ago made public a letter from Mr. Justice Tom Clark, then Attorney General, that of 231 Federal judges appointed since 1932, seventeen were Republicans and 214 were Democrats. Without regard to the competency of the appointees, these figures must undoubtedly indicate that political alliance exercised some influence in their selection. This of course is conclusively shown by the rather insignificant minority identified with the opposite party. And, while figures do not appear to be available prior to 1932, it is reasonable to conclude that in previous presidential administrations the preponderance of Republican appointees would be equally as noticable.²³

Of course, if these appointees have measured up to the high standards ordinarily expected of Federal judges, there perhaps cannot be too much complaint; but, this has not always been the case. It can hardly be gain-said that today the United States Supreme Court fails to measure up to its former prestige and elevation. And, moreover, if there is any deficiency in its level of ability and high standard, it must mean that those making the selections have been influenced by considerations other than professional qualifications.²⁴ In 1936 the late Judge Merrill E. Otis made a speech in Boston where he cited some statistics which still remain unchallenged. His figures showed that the percentage of Federal judges appointed since 1932 who were graduates of both college and law school were less than half of what it was in the three preceding presidential administrations. With no attempt to be partisan, this kind of evidence indicates that professional qualifications have frequently been sacrificed for other considerations. Since this can be true in any administration, whether Democratic or Republican, the present method of appointing Federal Judges of course is not ideal.

20. John B. Waite, Committee Report to A. B. A. (1937).

21. "The Error of Electing Judges," supra, See 17.

22. Vanderbilt, p. 13 and notes.

23. Winters, Selection and Tenure.

24. Winters, Selection and Tenure.

But the entire criticism of the Federal appointive system can not be laid to faulty politics when we have no specified legal standards to measure candidates for federal judgeships. And this likewise must hold true in many of our state jurisdictions, yet in England a candidate must not only be a barrister with wide experience, but must hold the rank of King's Counsel. Since only barristers of the highest legal attainment are selected for this coveted rank, it is almost certain that a judge selected from this group will be well qualified.²⁵ Moreover, recommendations must come from the Lord Chancellor who is responsible for the high standard of the English bench. And then his recommendations must be approved by the Prime Minister before the Crown makes the appointment.²⁶

In France all judges are specially educated for the bench. When a young man decides upon a legal career he must elect either to become an advocate or a magistrate; and from then on he is trained according to his selection in law school. When the student has been educated for the bench, after law school he will first become the assistant to an experienced magistrate. Later on he will probably be given a minor judgeship until he is qualified for a better one; and, as he becomes experienced step by step, he eventually will grown into one of the important judgeships.²⁷ This same system was used in Germany before the time of Hitler,²⁸ and may again be enforced in that country.

A somewhat similiar system was current in China, at least down through the administration of Chiang Kai-shek. To become a judge the aspirant was required to show a thorough legal training in a recognized law school. He was then obliged to prove a sufficient number of years in the practice of law to season him for a judgeship. This, however, could be substituted for experience as an instructor in law, or for a sufficient term as a legislator. Also, some of these preliminaries were waived in case the aspirant had been an acknowledged legal authority. Then with experiences in one of these categories he was required to complete eighteen months in judicial training followed by a year of probation. After this he might hope for an assignment on the bench.²⁹

And yet, the Constitution of the United States does not even require that an appointee to the Supreme Court of the United States be a lawyer in the sense that he is a member of the bar.³⁰ But, of course, it is unlikely that such an appointment would ever go to an individual not a member of the bar somewhere nor one unqualified. Nevertheless, aside from the fact that a judgeship of this nature presupposes a well qualified lawyer, there are no fixed rules for measuring his legal ability, his judicial tem-

25. William L. Burdick, "Bench and Bar of Other Lands," p. 78.

26. Thomas R. Robinson, "Selection of Judges," *Conn. Bar Journal*, Vol. 15.

27. Burdick, pp. 258-266.

28. Thomas R. Robinson, *supra*, sec. 26.

29. Tsao Hwa Loh, "Judicial Appointive System in China and How it Operates," *The Panel*, Jan. 1945.

30. Constitution of the U. S., Art. 3, Sec. 1.

perment, nor his talent to do the work required. And the same situation holds true as to many of our state constitutions.

Still, with any imperfections it may have, our appointive system for the Federal judiciary has never been radically changed by the law makers of this country. The same quite generally holds true for those states retaining the appointive system. This is especially true of Massachusetts where the system has been considered the most ideal. But even so, definite attempts have been made to change it. In 1922 a strong effort was made to gain an amendment to the state constitution providing for the election of judges, but it was thoroughly defeated. Again in 1937 it was under fire by reason of the large number of judicial appointments being made by Governor Charles F. Hurley to fill vacancies. But once more, the attempt failed.³¹ In an article concerning this situation the prevailing opinion was well expressed by Joseph H. Cinamon. He pointed out that by filling so many vacancies by popular election an unsightly and an unsavory scramble might have been the result. He contended convincingly that men of questionable fitness could well have been elected, and that judicial dignity and merit would have been supplanted by "political fanfare." The well known fact to every lawyer that Massachusetts has an exceptionally high judiciary, would appear to bear out the righteousness of this author's views.³²

But whether the elective system for the judiciary has been satisfactory in those states employing it might well enough be brought out by its record. At least it appears certain that the numerous methods of electing judges would show that as a system it has not entirely filled all the requirements. A review of these various methods shows that as a result of legislation in recent years, appellate judges are appointed in *California* and *Missouri*, but most trial judges are still elected by popular ballot. Only probate judges and justices of the peace are elected in *Connecticut*, and in *Florida* this is the situation with supreme court justices, county judges, and justices of the peace. In *Maine* probate judges are popularly elected, and so it is in *New Jersey* with certain surrogates. The same is true of probate judges and some county judges in *South Carolina*, while in *Vermont* probate judges and two lay members of each county court are popularly elected.³³

Judges are nominated at a party primary in twenty-five states: *Alabama*, *Arizona*, *Arkansas*, *Colorado*, *Florida*, *Georgia*, *Idaho* (justices of the peace and probate judges), *Kansas*, *Kentucky*, *Louisiana*, *Maine* (probate judges), *Maryland*, *Mississippi*, *Missouri* (trial judges), *New Jersey* (surrogates), *New Mexico*, *North Carolina*, *Ohio* (some), *Oklahoma*, *Pennsylvania*, *Tennessee* (customarily), *Texas*, *Utah*, *Vermont* (probate judges) and *West Virginia*.³⁴

31. *Jn. Am. J. Soc.*, Aug. 1938, pp. 53-54.

32. *The Law Society Journal*, Vol. VII, Nov. 1937, No. 8, pp. 1053-1054.

33. *Vanderbilt, Judicial Selection*, (d), p. 10.

34. *Vanderbilt, Judicial Selection*, (E), pp. 10-11.

At party conventions judicial nominations are made in five states: *Illinois, Indiana, Iowa, Michigan and New York*. But in *Ohio* most judges seek election on a non-partisan basis by filing nominating petitions; and in *Wisconsin* the only nomination of judges authorized is by a non-partisan nominating paper. In the following six states judges very often receive bipartisan endorsement: *Idaho, Kansas* (districts courts), *Louisiana, Maryland, New York, and Vermont* (probate judges). At times this is also true in twelve states: *Colorado, Illinois, Indiana, Iowa, Kansas* (other than district courts), *Kentucky, Minnesota, Missouri, Ohio, Pennsylvania, Utah and Wyoming*

Judges are elected at a general election in all but four where the elective system is in force: *Illinois, Michigan, Oregon, and Wisconsin*. But in these states, and in eleven others, separate ballots known as non-partisan ballots are used. They are: *Arizona, California, Idaho, Maryland, Montana, Nebraska, North Dakota, Ohio, Pennsylvania, Tennessee, Texas, South Dakota, Washington, and Wyoming*.³⁵

In only two states using the elective system is the bar formally consulted concerning the nomination of judges. This takes place in some sections of *Illinois* and *New York*. However, in twenty states the bar is informally consulted regarding judicial nominations, or makes its opinion known by polls or resolutions. These are: *Arizona, Arkansas, California, Florida, Idaho, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Nebraska, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Washington*.³⁶

In the opinion of representative judges, lawyers, and law school professors from the appointive jurisdictions, 82% appear to be generally satisfied with their trial judges. The same group on the whole appeared to be somewhat more satisfied that their appellate judges were fair, impartial and not subject to political or personal influence. However, in several of these jurisdictions it was considered that the appellate judges lacked a sufficiently high standard of learning. But in none of them was the system of popular election of judges favored.³⁷

Of a similar group from the elective jurisdictions, 78% appeared to be satisfied with their trial judges. In the same group from seventeen of these states, 93% were satisfied with their appellate judges; but in *Alabama, Illinois, Minnesota, Nevada, and New Mexico*, the percentage was only 53%. And in *Aizona, Colorado, Georgia, Indiana, Iowa, Mississippi, Texas, Washington and Wyoming* the percentage was 72%.³⁸

However, in virtually all states where judges are elected, statutes provide the executive power to fill vacancies by *ad interim* appointments.

35. Same as 34.

36. Vanderbilt, p. 12.

37. Vanderbilt, *Judicial Selection*, (A), p. 12. See also notes 34 to 39.

38. Vanderbilt, see notes 40 to 44 under (A), p. 12.

This, of course, should definitely be taken into consideration when judging the merits of the elective system in those states where interim selections are lawful. Such a situation may well be the difference as to whether or not the elective system is workable and satisfactory in these jurisdictions. As a matter of fact it is conceded by some very competent authority that the elective system would have been found unworkable long ago except for the ameliorating influence of interim appointments by the governor. As a rule his selections are quite carefully considered. Very often the bar in the district or circuit where a vacancy is to be filled is called upon to assist, and as a result a well qualified and thoroughly competent lawyer is usually selected. Customarily, such an appointee gives excellent service during the balance of his predecessor's term, and he is often elected to a full term of his own. Actually, the practical effect of this method is to install the appointive system in all cases where judges must be selected between elections. Of course, the appointee must afterwards be elected, but the fact that he has first been appointed gives him a tremendous advantage over his opponents.³⁹

In the State of Wyoming, all the Supreme Court judges were originally appointed to fill vacancies left by death or resignation. But since then all have been reelected several times, and all have held office for over twenty years. In three of the seven judicial districts the district judges have been appointed to fill vacancies, and in one of these districts the appointed judge has held office for not less than twenty years growing out of subsequent elections. The remaining two appointments are recent and have not yet experienced an election.

Yet, as state populations have increased and living has become more complicated, many jurisdictions west of the Atlantic seaboard using the elective system have continued to find serious fault with it. In a considerable number of our large western and southern cities it has become apparent that in many cases judicial incumbents and new candidates are wholly unknown at election time, and it has also become apparent that capable lawyers have refused to enter the election scramble. These lawyers appear to consider that their standings and reputations mean more than to be thrown into competition with candidates of much less standing, but frequently with more popular appeal. Moreover, it has become evident that good judicial candidates can not hope to bring a campaign to a large group of voters without sacrificing considerable of the dignity and decorum incident to a judicial office. Also, for many years there has been an obvious lack of interest in non-political elections, even in communities of small population.⁴⁰

Gone is the time when a term of the district or circuit court in any good-sized county seat was an event no local citizen wanted to miss.

39. Vanderbilt, *Judicial Selection, under Appointment by the Executive (A)*, p. 6; also under (B), p. 22.

40. *Reader's Digest*, Nov. 1948, *supra*.

And gone also for the most part, is the keen interest in the court proceedings and trials, and in the judges and lawyers attending these terms. In those old days the citizens generally knew all the lawyers in the district, even in the large centers, which made it much easier to know whom to vote for. And as a result good judges were usually elected. But today, the great majority of the electors in these same communities take little interest in the ordinary term of court. Even in the most rural communities only the spectacular trials attract any attention whatever.

The same lack of interest is frequently evident in the election of judges. Many of the voters pay but meager attention to the names on the non-partisan ballot for any judgeship. And in the case of an election for a judge of the appellate courts, few electors make any attempt to learn about the candidate at all. This want of interest has often paved the way for the aggressive lawyer-politician, better trained in the art of getting votes, to win against his more earnest and well qualified opponent.

It is for these reasons that many of the states have been studying and re-analyzing the original appointive system of our colonial forefathers. But this research has generally led to some form of a composite system which could embody the best elements of both the appointive and elective systems. The states of *California* and *Missouri* have been pioneers in this respect. Both of these states have adopted a composite system for the appointment of judges of their higher courts. A composite system has also been made effective for the Baltimore People's Court in Maryland, which tribunal is of inferior jurisdiction.⁴¹

California was the first to make the change from an elective system. In 1934 it adopted a constitutional amendment under which justices of the supreme court, and of its district courts of appeal, could be selected by gubernatorial appointment.⁴² But under the amendment all selections are subject to confirmation by a commission which passes upon qualifications. The successful appointees are then retained in office as long as the electors at periodical elections decide they should continue to serve. Also, by the same constitutional amendment, this system may become effective for the appointment of superior court judges in any counties where the electors approve it by referendum.

The commission which passes on nominations made by the governor is composed of the Chief Justice of the Supreme Court, the presiding judge of the District Court of Appeals in the district where the judge is to serve, and the Attorney General. By the terms of the amendment, the composition of the commission may be varied when the office of Chief Justice of the Supreme Court is vacant, or where other factors warrant a different construction.

41. Report, Senator Norman C. Barry for Ill., Legislative Council (Proposal 265), Selection of Judges, p. 12; Maryland Constitution, Art. IV, Sec. 41A.

42. Constitution of California, Art VI, Sec. 26; also Art. VI, Sec. 3, p. 240, and Sec. 4A, p. 242, Sec. 6, p. 246, Sec. 8, p. 246, and Sec. 9, p. 246.

The California system is employed to fill vacancies on the appropriate bench, whether they occur due to the death, resignation, unwillingness to run for reelection, or the rejection at the polls of the candidate. After an appointment is consummated, the name of the new judge is submitted to popular election at the next general election to determine whether or not he may be entitled to a full term. The basic term of higher court judges is twelve years, and six years for others. An appointee who desires a full term, or a sitting judge who would have another term, must file a declaration of candidacy for election to succeed himself. His name is then placed upon the general election ballot, with the title of the judgeship he wishes, and the electors vote "yes" or "no" on his candidacy. He is opposed by no other candidate. If the vote is favorable the incumbent is given a full term, or succeeds himself to another term, as the case may be. But if the vote is not favorable, another appointment is made.⁴³

However, the California plan was not an original idea at the time of its adoption. As early as 1913 reform in the manner of selecting judges had become a project of the American Judicature Society organized in July of that year. At the time of the formation of the society, Albert K. Kales, of the Northwestern University Law School, had become a member of a committee of judicial selection, and to him belongs much of the credit leading to a solution. A few months later Kales published his plan for selecting judges, which appeared first in the *Annals of the American Academy of Political Science*, and later in the bulletins of the American Judicature Society. His proposed methods took advantage of the best features of both the appointive and elective systems, and eliminated the faults of both systems as nearly as possible. In fact, his plan was not unlike that adopted in California by constitutional amendment in 1934, lacking some of the refinements later worked out by him.⁴⁴

Finally, in 1937, the *Kales Plan*, then in more concise and concrete form, was given the powerful support of the American Bar Association.

The text of his plan as endorsed was as follows:

- (a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officials and in part by other citizens, selected for the purpose, who hold no other public office.
- (b) If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the State Senate or other legislative body of appointments and made through the dual agency suggested.
- (c) The appointee after a period of service should be eligible for reappointment periodically thereafter, or periodically go before the people upon his record, with no opposing

43. Norman C. Barry Report, *supra*, pp. 12-13.

44. Winters, Selection and Tenure.

candidate, the people voting upon the question "Shall Judge Blank be retained in office?"⁴⁵

So far, only the State of Missouri has adopted the Kales Plan, or at least this plan in substantial form. Shortly after the meeting of the American Bar Association in 1937 when the plan was adopted, the Missouri Bar Association commenced to study it. Missouri at the time was a state where bosses ran the judges. One powerful politician boasted that he personally elected the Circuit Court bench in St. Louis. Lawyers were retained by their clients according to the influence they had with the judges; and judges paid their political backers heavily to get on the bench. So powerful had become the bosses that one judge of their choice was actually a pharmacist who attended night law school. His only claim to legal perfection was that he had filed eight suits for divorce and one for annulment in the Missouri courts. But, with the backing of the political bigwigs he was elected.

By 1940, the aroused Missouri citizens stumped the state for a change. They obtained signatures, hung posters, put out hand bills, and kept the slogan before the people: "Take the courts out of politics."⁴⁶

The *Missouri Plan*, as it has become known, won in the 1940 Missouri election. In 1942 it won again when the politicians sought to upset it, and was written into the new Missouri Constitution in 1945.⁴⁷

Primarily, the Missouri Plan differs from the California System in that action by a non-partisan judicial commission precedes, rather than follows, the governor's action. In California the function of the commission is to confirm the governor's appointments, while in Missouri it submits to the governor lists of nominees from which appointments are to be made. Under the Missouri Plan there is one appellate judicial commission and a number of circuit court judicial commissions. In addition, the commissions are so constructed that there can be no possibility of full control by the governor through his appointments to these bodies.⁴⁸

The appellate judicial commission is concerned with the selection of judges to the supreme court and the three courts of appeal. It is composed of the Chief Justice of the Supreme Court who acts as chairman, three lawyers, one elected by members of the bar from each of the three appellate court districts, and three laymen. One layman is appointed from each of the appellate court districts by the governor. Circuit Court judicial commissions are concerned with the selection of judges in the circuit and probate courts of the City of St. Louis and Jackson County (Kansas City). This also includes the St. Louis Courts of Criminal Correction, which were added by the terms of the new constitution; and also other courts

45. Resolution of House of Delegates, of A.B.A. recommending plan for selection and tenure of judges — Columbus, Ohio, June 6, 1937.

46. Reader's Digest, *supra*.

47. Missouri Constitution (1945) Art. V. Secs. 29(a) to 29(g), inclusive, pp. 86-90.

48. Norman C. Barry Report, *supra*, pp. 13-14.

of record in any judicial circuits adopting the system.

Each circuit court judicial commission is composed of a chairman, who is the presiding judge of the District Court of Appeals where most of the population of the circuit is located, and four others. Two of these are lawyers of the circuit elected by the circuit bar, and two are laymen who reside in the circuit. These two are appointed by the governor.

Except for the chairman, the members of all commissions serve six years. Their terms are staggered, and the commissioners are not eligible to succeed themselves. These matters are set out according to Supreme Court rules. Since the Missouri gubernatorial term is four years with laws against reelection, no single governor can gain control of a commission through his own appointments. Moreover, the governor's lay appointments constitute less than a majority of each commission. Members of the commissions are allowed expenses but serve without compensation. And, with the exception of the chairman, they are prohibited from holding any public or political office in a political party.

When the governor makes his appointment from the list submitted by the appropriate commission, the appointee serves as judge until the next general election. At this election the people of the appropriate jurisdiction vote on the question of retaining him in office. Very similar to the plan in California, they go to the polls with a single ballot, reading: "Shall Judge (naming him) of (title of the court to be filled) be retained in office? Yes——. No——."

As in California, the judge must file a declaration of candidacy if he desires to remain in office for a full term. He runs unopposed of course, on a non-partisan type of ballot. Judges of the two higher courts serve for terms of twelve years, circuit court judges for six years, and judges of the other courts for terms of four years. If a judge fails to file his declaration of candidacy, or is rejected at the polls, the governor makes another appointment from the list submitted by the appropriate commission. All judges are prohibited from making political contributions or from holding office in a political party. Moreover, they can take no part in any political campaign.⁴⁹

In advocating the *Missouri Plan*, the Missouri Institute of Justice claims it takes the courts out of politics and assures an independent judiciary. It further asserts that the system establishes a non-partisan method of nominating judicial candidates, and eliminates the evils of the primary system. Also that it establishes a non-partisan method of electing judges at regular intervals, and makes it unnecessary for a judge to incur political obligations. It is said to insure careful consideration of the qualifications of judicial candidates before their names go on the ballot, and to encourage competent lawyers to become judicial candidates who might

49. Same as 48; Winters, Selection and Tenure; Pamphlet of Special Committee A. B. A. on Judicial Selection and Tenure, Sec. III and IV.

not otherwise submit themselves to the hazards and expenses of an election campaign. In addition, the voters' attention is focused on the record of the judge, since he serves at least a year before being a candidate for a regular term. This feature is claimed to make it easier to remove incompetents and retain the well qualified. Further, the claim is made, that the system enables the judge to devote his entire time to his duties, without having to plan for the next campaign for reelection. And, very important, it promotes efficiency of the courts, and speeds up the administration of justice.⁵⁰

While neither the California nor the Missouri plans have been in operation long enough to produce an accurate appraisal of them, greater favor has been shown the Missouri System. Many members of the bar have substantiated the views of the Missouri Institute of Justice, both in speech and in writing. Many believe it is a decided improvement over the elective system, and are convinced it does insure an independent judiciary and the confidence of the people.

However, there are indications that the California System has been something of a disappointment to many of its sponsors. No doubt, too great an improvement was expected. The primary objection has been that after all, until recently at least, the selection of judges has not been entirely removed from politics. The reported reason for this condition has been that the commission, a majority of whom owe their appointments to the governor's office, tend to approve all his appointments. This situation caused a bill to be introduced in 1943 to abolish the system, but it was not acted upon since the state bar promised to submit a remedial program.⁵¹

The Missouri Plan has also come in for some criticism from those have studied it. The chief objection has been that it tends to retain in office most of the incumbents, when better men might be selected if the incumbents could be more easily removed. At the same time, a large number of lawyers have pointed out that over a period long enough this situation will right itself. They believe it can not happen otherwise than eventually suitable judges will replace the undesirable ones. However, it has been definitely shown that a composite plan does actually provide a great advantage for incumbents who seek reelection when compared to what results might be expected under an elective system. But, under the time-honored appointive system incumbents usually remain in office for life. Consequently, the theory that incumbents remain too long under

50. Norman C. Barry Report, *supra*, p. 14; William Logan Martin, "Selection and Tenure of Judges," 8 *Ala. Lawyer*, (1947) 131; John Perry Wood, "Missouri Victory Speeds National Judicial Selection Reform," 26 *Jn. Am. J. Soc.* (1942-43) 142; William W. Crowder, "The Operation of the Missouri Non-Partisan Court Plan," 27 *Jn. Am. J. Soc.* (1946-47) 152; James M. Douglas, "Judicial Selection and Tenure: 'Missouri Plan' Works Well in Actual Results," 33 *Am. Bar. Assn. Jour.* (1947) 1169.

51. Norman C. Barry Report, *supra*, pp. 15-16; also "California Selection Plan to be Revamped," 28 *Jn. Am. J. Soc.* (1944-45) 91.

the composite systems is perhaps not well founded. No doubt these theories are expressed in states where the elective system has become too well established, and the constituents are used to a more frequent change.⁵²

Yet, while making due allowance for all the strong points of the composite systems thus far in operation, they virtually reach only the appellate courts and the large city courts of record of the two states using them. Even the Baltimore People's Court, operating under a composite system, has jurisdiction only in one of the largest cities in this country. Moreover, up to the present time the composite systems of neither California nor Missouri have been adopted in any of the cities and less metropolitan jurisdictions. Even though the constitutions of each of these states have provided for their adoption by referendum throughout every jurisdiction of lesser population, none has complied. In fact, when extension of the California plan was attempted in Los Angeles County, it was rejected. However, this is the only occasion where the question has been presented to the electorate in any jurisdiction in either California or Missouri. No particular explanation has ever been given for this situation, except that the fault may lie more in a lack of interest than because of any inherent defect in the systems themselves.⁵³ But no doubt the fact is that the electors were not ready to change from a well established system to a new and virtually untried one—untried at least in small communities.

But in spite of the fact that neither California nor Missouri have entirely adopted their respective composite systems, other states continue to favor them. Sentiment has been expressed in twenty-three of those states employing the elective system to abandon it in favor of the American Bar Association plan as exemplified in Missouri. In about half these particular states, however, the sentiment is still that of a minority group. At the same time there are active movements favoring the plan in *Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Nebraska, Pennsylvania, Texas, Washington, and Wisconsin*.⁵⁴

The State of Wyoming is classed among those showing some sentiment favoring the Missouri Plan, but so far it does not appear to be very outspoken.⁵⁵ Undoubtedly, for reasons previously expressed, it has long ago been determined that a composite system in Wyoming would be of little value. Our Bar is so small and all its members are so well known that a poor interim appointment would seldom be likely. Moreover, if such a plan were adopted it would mean a constitutional amendment, and that might be slow in coming. There has been so little complaint concerning the quality of our judges, either of the appellate or of the trial bench,

52. Norman C. Barry Report, *supra*, p. 17, under *Lawyer Poll on Composite System*.

53. Norma C. Barry Report, *supra*, p. 16, under *Other Evaluations*.

54. Vanderbilt, "Judicial Selection," under (B), p. 15.

55. Vanderbilt, under (B), p. 15 and note 44.

that the electors would probably not take the change seriously. At all events, experience in other states of small population and a small Bar has borne out this theory.

Yet, even in a state like Wyoming there can be do doubt that the nominating commission under a composite system could be of considerable value to its citizens. It might be effectively shown that since most of our judges are originally appointed, the governor could be relieved of a great single responsibility, and would welcome such assistance.

Moreover, without the worry, expense and inconvenience of a periodical election campaign, our judges could go about their judicial duties with a greater feeling of security and independence. And besides, a composite system would help to provide the same competent and thoroughly scrupulous judges we have thus far been fortunate in having. Knowing that the political scramble would be eliminated under the Kales plan, it is more likely that we would continue to have the better type of lawyers seeking our important judgeships.

Of course, while the Kales plan is being advocated, there are those who claim the professional groups are maneuvering a return to the *Guild System* of by-gone ages. They maintain that the old freedom and fluidity is passing, and that tight lines are being drawn in an attempt to gain monopolistic control in all the professions. It is the view of some that the legal profession is definitely headed in that direction. They argue that any composite plan is but an additional means to further exclude the public from any rights it might have to set standards and control methods of practice. They urge that a new judge should go into office responsible only to the people of the district to which he belongs, and not to a professional guild. In short, this group disagrees with the premise that the functions of the courts are such that the judges should be entirely free from politics.⁵⁶

Yet, it is possible that those who have these views misconceive the essential functions of a court, since a court's purpose is not always to give effect to the popular will. While undoubtedly the popular will may at times be vindicated by a court decree, at other times the righteous declaring of a law may not be at all popular. Occasionally it is the duty of a court to find unconstitutional some popular act of the legislature. Then sometimes it becomes the court's obligation to check the authority of some powerful group, or to bring candor where emotions have before existed. It is for these reasons that the duties and functions of our courts should be independent of popular pressure.⁵⁷

Also, the many problems pertaining to proper judicial salaries, and

56. William Anderson, Professor of Political Science, Uni. of Minnesota, "Reorganizing Minnesota's Judiciary, A Layman's View," *Minnesota Law Review*, Vol. 27 (1942-43) 383-89.

57. Error of Electing Judges, *supra*, See 17.

of retirement in case of sickness or old age could better be solved under the Kales plan. Moreover, these particular essentials may be additional means of always securing the services of the best qualified lawyers for the bench. Often this has not been the case under the elective system in many jurisdictions, although not particularly in Wyoming. At all events, it stands to reason that competent lawyers might be reluctant to give up their well established and lucrative law practices for the chance of a few years on the bench. But, with the election hazards removed, and the assurance of a reasonably long tenure in office, followed by adequate retirement, a qualified lawyer might be more inclined to accept a judicial position.⁵⁸

Still, as frequently intimated, without a composite plan the trend in Wyoming is definitely away from the once popular doctrine espoused by President Jackson a century ago. The method of electing judges is now on a non-partisan basis; judicial salaries have been recently raised,⁵⁹ and interim appointments have been assuring us of good judges who hold office a considerable length of time.

However, after the composite plans advanced by Kales have become better assured by longer usage, they may appear more practical for jurisdictions of lesser population. This era may not arrive in the near future, but scholars believe it is on the way.⁶⁰ The trend throughout the Nation is becoming more opposed to the Jacksonian doctrine of short judicial terms and popular election of judges. The traditional appointive system inherited from England by the Federal Government and the original states may never wholly supplant the elective system, but the Kales Plan will. It is entirely possible that the people of Wyoming will eventually adopt such a plan.

58. Special Committee, A. B. A., *supra*, Sec. V.

59. Wyoming Session Laws 1949, Ch. 65, Sec. 1.

60. Howard Whitman, "Behind the Black Robes," *Woman's Home Companion*, Feb. 1948. (Condensed in *Reader's Digest* under "Let's Have Competent Judges," *supra*).