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A Better Way to Select our Judges

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First of all, let me thank you most sincerely for this opportunity to revisit your beautiful state and Wonderful West. This is not my first trip to Wyoming, and I hope not my last. At the foot of the Big Horns near Buffalo I had my first glimpse of snow-capped peaks a few years ago. Every state you know is noted for something of its own. Wyoming is famous around the world for buttes and sagebrush, for the Tetons and Yellowstone, and for the rich and colorful cowboy tradition immortalized both on television and on your automobile license plates.

Missouri, too, is a great and colorful state. What the mountains are to you, Missouri's great rivers are to her. With the rivers goes the picturesque riverboat tradition, and the immortal stories of Tom Sawyer and Huckleberry Finn. Missouri also has limestone caves, Ozark hillbillies and Missouri mules.

It was during my residence in Missouri—from 1936 to 1940—that the foundation was laid for Missouri's greatest claim to fame as far as the legal world is concerned—the Missouri Plan for selection of judges.

An Historic Bar Association Dinner

I remember so well the first time I ever heard of it. Like you, today, I was at a bar association meeting in the great Coronado Hotel, now the Sheraton, in St. Louis. John Perry Wood, chairman of the American Bar Association Committee on Selection and Tenure of Judges was there from California to discuss that topic. The address marked the active beginning of a movement in that state which resulted in one of the greatest forward steps in the administration of justice of the past century.

The more discerning among you may have surmised that I am here as an advocate of what is commonly known as the Missouri Plan. Actually, its substance had been worked out and advocated for a generation before anybody ever thought it would first come to fruition in the state of Dred Scott and the Missouri Compromise. In a way, the Missouri Plan is itself another Missouri Comprise—a compromise between the elective and the appointive methods of selecting judges. Let's take a minute to review just what the Missouri Plan is.

When a vacancy occurs in the supreme court, any appellate court, or in the circuit or probate court of St. Louis or Jackson County (wherein

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* Address before legislative meeting, Wyoming State Bar, Cheyenne, January 12, 1951. Mr. Winters is secretary-treasurer of the American Judicature Society and editor of the *Journal of the American Judicature Society*.

Kansas City is situated) the governor fills the vacancy by appointment from a list of names submitted to him for that purpose by a non-partisan judicial commission. For the supreme and appellate courts, the commission consists of the chief justice, three lawyers elected by the bar and three laymen appointed by the governor; for the circuit and probate courts it consists of the presiding judge of the appropriate court of appeals, two members of the bar residing in the circuit, and two laymen appointed by the governor. Each judge so appointed holds office a minimum of one year and then until the end of the year of the next general election. Sixty days before that election he may file a declaration of candidacy to succeed himself, and his name is then submitted to the voters on a separate judicial ballot, without party designation and without competing candidates, reading simply "Shall Judge——— of the ——— court be retained in office? Yes. No." If the vote is affirmative, he holds office for the regular term of six years after which the same procedure may be repeated. No judge goes on the bench in any of those courts except by appointment, and no appointment is made except upon nomination of the judicial commission. The plan may be extended to other courts by vote of the people involved, and a campaign to that end in St. Louis County, adjacent to St. Louis, is now in progress.[1]

Judicial Selection A Century Ago

The elective judiciary of this country really dates from only about a hundred years ago. In Colonial times most judges were appointed by the governors, a few by the legislatures.[2] After the Revolution the preponderance turned the other way. New states came into the Union rapidly during its first half-century, and all of them adopted one or the other of those two methods. As early as 1812, to be sure, Georgia had tried election of inferior judges, and in 1832 Mississippi went over to a completely elected state judiciary,[3] but these early precedents were largely ignored elsewhere, and right up until the middle of the century about half of the judges of America were appointed by governors and the other half by state legislatures.

In 1846 the Union contained twenty-nine states. Appointment by the governor was the method used for selecting all of the judges in twelve of them—Delaware, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, New Hampshire, New York, Pennsylvania, Texas and Vermont—and for supreme court judges in Indiana and Michigan. The legislatures

1. For the full text of the constitutional amendment as adopted in 1940, see Thomas F. McDonald, "Missouri's Ideal Judicial Selection Law," 24 J. Am. Jud. Soc. 194 (April, 1941).
2. See Glenn R. Winters, *Selection of Judges in New York and in Other States* (1943), pp. 1-4; William S. Carpenter, Judicial Tenure in the United States (1918), p. 156 ff.
3. A constitutional and statutory history of the selection and tenure of judges in all states from 1776 to 1944 may be found in Chapter IV of Evan Haynes, *Selection and Tenure of Judges* (1944), pp. 101-135.

selected all of the judges in the same number of states—Alabama, Arkansas, Connecticut, Florida, Illinois, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee and Virginia—as well as supreme court judges in Iowa and all but inferior court judges in Georgia. Those were elected, as were circuit court judges in Indiana and Michigan, district court judges in Iowa, and the entire judiciary in Mississippi.[4] It may be a surprise to some people to learn that an appointive judiciary once existed in states like Kentucky, Tennessee, Michigan, Missouri, Illinois, Arkansas and Texas.

The New York constitutional convention of 1846, which substituted popular election for appointment for all of New York's judges, really ushered in the era of elected judges in this country. Just the year before, Texas had come into the Union with an appointive judiciary, but none of the nineteen states admitted thereafter had anything but elected judges, and a majority of the older states scrambled to join the parade. Illinois, Arkansas and the new state of Wisconsin were the first recruits, in 1848. The landslide came in 1850, when Kentucky, Michigan, Missouri, Pennsylvania, and Virginia all swung over to election, along with Alabama and Vermont as to a part of their judiciary. The next three years brought in Indiana, Maryland, Ohio, Louisiana and Tennessee. By the end of the 50's, Iowa had adopted election for all of the judges, and Minnesota and Oregon had come in as new states. The next decade added the new states of Kansas, West Virginia, Nevada and Nebraska, and the older states of Alabama, Arkansas, North Carolina and Texas. More new states, all elective, were added from time to time until 1912, when Arizona and New Mexico completed the Union as we have it today.

The Pendulum Swings Back

Not all of the older states were satisfied with the innovation. Seven of them—Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, Rhode Island and South Carolina—never got into it at all, and Maine only with respect to probate judges. Virginia went back to legislative appointment after fourteen years of the elective system. Vermont began electing judges of inferior courts in 1850, but gave it up for legislative appointment of all judges in 1870. Florida first tried electing circuit judges and appointing supreme court justices and finally reversed itself, electing supreme court justices and appointing circuit judges. A movement to go back to appointment got under way in New York in the 1860's and has been in existence off and on ever since, but with real momentum since 1943, when a political incident involving an elected judge drew headlines all over the country.[5] Judicial selection reform has been one of the recom-

4. Haynes, *op. cit.*
5. "New York Experience Shows Need for Better Methods of Choosing Judges," 29 A.B.A. Journal 690 (Dec., 1943); "Judicial Selection Improvement Studied in New York," 27 J. Am. Jud. Soc. 153 (Feb., 1944).

mendations in the governor's annual message to the legislature every year since then. Meanwhile, California[6] and Missouri were able to accomplish substantial reforms, and Alabama[7] achieved a partial one this year. Active campaigns to that end are now in progress in Pennsylvania, New York, Colorado, Wisconsin, Oklahoma, Michigan, Nebraska, New Mexico, Arizona, Arkansas, Texas and Utah, and efforts are being made to get something started in Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Washington, West Virginia and your own state of Wyoming. The Constitution drafted by the Hawaii Constiutional Convention last summer in anticipation of statehood contains provision for an appointive judiciary. Here, obviously, are signs of an unmistakable trend away from the elective vogue of the past hundred years.

Why did the elected judiciary not make its appearance in this country until three-quarters of a century after the Declaration of Independence? Why did it then so suddenly acquire such a large following; and why now is there a rising tide of sentiment for reform or modification of it?

The answer to the first question, I think, is simply that nobody had thought of such a thing before. Even today, with the exception of the judges of the local courts of the cantons of Switzerland and the people's courts of the Soviet Union, judges are not elected in any country except the United States, regardless of its form of government.[8] Democracy is an old, old idea, dating back at least to ancient Greece, if not before, but in no democracy, even today, are all officials elected. One of the biggest responsibilities borne by any state governor is that of making appointments —not one or two but hundreds of them in every term of office. Why are not these state officials elected? Not because their jobs are unimportant—many of them are positions of the highest responsibility. The reason is that the voters are neither able nor willing to do it, and the democratic system would simply break down if so much were asked of them. The voters are able, willing and determined to make known their will regarding rival governmental policies and the personalities representing them. Very few people of voting age can be found in this country who do not have some kind of opinion on the issue of internationalism versus isolationism,

6. Judicial vacancies are filled by appointment of the governor, subject to confirmation by a commission composed of the chief justice of the state, the presiding judge of the appropriate court of appeals, and the attorney-general, incumbents going before the people at the polls with no opposing candidate at the end of the term. Applicable only to appellate courts and judicial circuits where adopted by vote of the people. Calif. Const. Art. VI, Sec. 26, Deering's Codes, Laws and Consts. of Calif., 1935 Supp., pp. 2129-31, adopted Nov. 6, 1934; 18 J. Am. Jud. Soc. 102 (Dec., 1934); 20 A.B.A. Journal 742 (Dec., 1934).

7. Vacancies are filled by appointment of the governor from a list of nominations submitted by a non-partisan nominating commission. The non-competitive election feature is not included, and the plan applies only to the circuit court of Jefferson County, in which Birmingham is located. 34 J. Am. Jud. Soc. 120 (Dec., 1950); Alabama Journal (Montgomery), November 25, 1950, p. 9 (text of plan).

8. See Amos J. Peaslee, *Constitutions of Nations* (1950), Vol. 3, Appendix, Table VII, Judicial Departments.

for example, or who are not either for or against President Truman and the "Fair Deal," and governmental administrations can feasibly go to the polls for guidance on such issues and get it. But here is quite a different problem: a superintendent is needed for a great state institution—a prison, perhaps, or a hospital. How shall a man for the job be found? By election? Obviously not. The voters have no way of determining who is available or who is best fitted for the job. Someone must sift the applicants and pick out the best man, and even in a democracy the governmental positions that are filled in that manner overwhelmingly outnumber those that are filled by election.

Now the question is, in which group should judges be included? The fact that practically everywhere else, and in strong minority of our own states and our federal system, judges have been and are appointed rather than elected is strong evidence that mankind as a rule has put judges in the second of those two categories—those as to whom the voters are not in a position to do an adequate job of weighing qualifications and selecting the best of the applicants, rather than those among whom it is easy to choose on the basis of personalities or policies reasonably familiar to all.

Then why did the American states almost literally stampede into the elective judiciary a century ago? That was the era, we are told, of "Jacksonian democracy." Exhilarated with the success of their young republic, Americans were eager to extend its principles in every direction possible. In 1845 the governor of New York declared that in his opinion many officials then selected by the governor's nomination might be directly elected by the people and be "more in accordance with the popular feeling."[9] What could be more natural under such circumstances than to experiment with election of other officials then taking office by appointment? As far as we know they never got around to electing their prison wardens, but they did try it out on the judges, and they had some good reasons for doing so. Some judicial decisions had been noticeably partial to the landed and propertied classes, and they thought, not without reason, that elected judges would be closer to the people and hence would deal more fairly with them.

Along with election of judges came the short-term—the obvious object of which was to make possible the rejection of an unsatisfactory judge with a minimum of delay.

Albert M. Kales and the Kales Plan

How, then, did the people get along after they had succeeded in establishing an elected judiciary over most of the country? We have already referred to the campaign for return to appointment that began in

9. J. M. Landis, "Selection of Judges in New York," 56 N. Y. State Bar Ass'n. Rep. 206, 214, note.

New York in 1867. The Index to Legal Periodicals for the closing years of the last century and the opening years of this one lists an increasing number of articles by legal writers on selection of judges, criticizing the elective method and speculating on possible ways to improve it.

It remained for a brilliant and original thinker on the law faculty of Northwestern Unversity, Albert M. Kales, to devise a system combining the best features of both the appointive and elective systems. Kales reasoned that the greatest merit of appointment was the opportunity to have a competent person make a skilled appraisal of the type of person needed for the job and of the qualifications of the applicants for it, but its weakness, in democratic society, was the fact that there was no way by which the people might unseat a judge who proved to be incompetent or tyrannical. On the other hand, while in judicial elections the voters are usually at a loss to know which judicial candidates to vote for, if a particular judge does make himself outstandingly obnoxious, the people can rise up at the next election and oust him from office. What is needed, thought Kales, is a combination of these two that will provide the skilled and trained selection of appointment along with a veto for the people at the polls. Kales proposed to accomplish this by providing for an elected, short-term chief justice, answerable at frequent intervals to the people, and responsible for manning the courts with competent men. He would then fill vacancies by appointment, and Kales suggested that he might be assisted in his search by a commission or a judicial council, which would submit nominations to him to choose from. Then, after a probationary period, the appointee would go before the voters without a competing candidate on the sole question of whether or not he was to be continued in office.

This proposal was published by Kales in an article in the Annals of the American Academy of Political and Social Science early in 1914,[10] and as a chapter of his book Unpopular Government in the United States, published the same year.[11] The American Judicature Society to Promote the Efficient Administration of Justice had just been organized in Chicago, and Kales, one of its founders, drew up a draft of a proposed judicial selection plan embodying his proposals, which was published in the Society's Bulletin IV in March, 1914. This was revised and republished from time to time during the next few years, and the Society has continuously advocated its adoption by the states from that time to now.

It was a slow process, but as the years passed the movement gathered supporters and momentum. An American Bar Association committee was created, and in 1937, with John Perry Wood as its chairman, it presented a proposal based upon the Kales Plan to the House of Delegates and the

10. "Methods of Selecting and Retiring Judges in a Metropolitan District," *Reform in the Administration of Justice*, The Annals, 1914, pp. 1-12.
11. University of Chicago Press, February, 1914.

House adopted it.[12] The following year came Judge Wood's historic speech in St. Louis, and two years later, in the November election of 1940 the voters of Missouri incorporated it into their basic law and gave it a chance to prove itself in practice.

Success of the Plan in Missouri

The most natural question to ask at this point is, how did it work out in Missouri? Are the people satisfied with it, and is it functioning as Kales envisioned it?

It did not take long to find out how the Missouri people felt about it. The legislature had refused to submit the plan and it had been necessary to submit it by initiative. The legislature then declared the people had been deceived and had adopted it by mistake, and submitted a repeal amendment. The plan was adopted in 1940 by a majority of 90,000, and the repeal amendment in 1942 was rejected by a majority of 180,000. Three years later Missouri had a constitutional convention, and every effort was made by those same political interests to keep the plan out of the new constitution but it went in unchanged and the people voted in the new constitution, so that the voters of that state have three times expressed their desire to have their judges selected in that manner.[13]

In 1947, Will Shafroth of the Administrative Office of the United States Courts, in preparation for an address before the Colorado Bar Association, circularized forty selected lawyers in Missouri and California and asked for their frank appraisal of the results of their two plans to date.[14] The Missouri replies were very highly favorable, even though one die-hard declared he would vote against the plan as long as he could "stagger to the polls." The California plan, adopted in 1934, differs from that of Missouri in that the commission confirms the governor's appointments instead of submitting nominations. It also was favored by the lawyers, but some expressed a preference for the Missouri-type plan over theirs.

Shall We Adopt It in Our State?

It is proper for the people of Wyoming or any other state where so far-reaching a change proposed is to ask: "Do the arguments advanced for this proposal apply here? What will it do for us that the present system does not do? Are there any good features of the present system which this proposal would compel us to give up?"

Albert Kales lived in the great city of Chicago, and in his writings the

12. 23 A.B.A. Journal 102-107 (1937); 62 A.B.A. Rep. 893 (1937).
13. See James M. Douglas " 'Missouri Plan' Works Well in Actual Results," 33 A.B.A. Journal 1169 (December, 1947).
14. "Forty Lawyers Appraise Operation of California and Missouri Methods of Selecting Judges," 31 J. Am. Jud. Soc. 176-184 (April, 1948).

strongest argument against election of judges is the fact that in such places judicial candidates are wholly unknown to the great mass of voters, and election of judges is really appointment by the extra-legal powers who determine what names shall appear on the ballot. These arguments apply today with equal force in New York and in other metropolitan areas. They are not without weight in many other localities. It is for the people of any particular state to decide for themselves to what extent they apply there. Very likely Wyoming voters are better acquainted with their judicial candidates than most city voters are. Whether they have a fair enough understanding of the specialized requirements for the filling of judicial offices, and adequate ability to make a fair appraisal of the extent to which rival candidates measure up to them is for you to decide. My guess is that they are in a position to do a much better job of it than their New York and Chicago cousins, but that they still labor under the same handicaps only in less aggravated measure, and that appointment by a responsible official who is himself accountable to the people at the polls would here, as elsewhere, make possible a more careful and intelligent selection. Your population is small and your people are not lost in numbers as they are in the metropolitan cities, but your distances are great. I believe it is about five hundred miles from here to Yellowstone. I do not know from experience, but I suspect that these mileages may to some slight extent offset the advantage that you have over the city voters by reason of smaller population and fewer candidates, so far as acquaintance with them on the part of the voters is concerned.

But what about "taking the judges out of politics?" One method especially devised for that purpose is election of judges on the non-partisan judicial ballot, which I understand you use in Wyoming. I am not familiar with conditions in your state and I cannot venture to say whether or not it has taken your judges out of politics or not, but if it has, it is doing better than in most states where it is in use. Non-partisan election of judge does free the judge from certain ties and obligations to political parties, but he loses more than he gains. Political parties are known and judged by their policies and personalities, and it is to their advantage to have both of high caliber. A party's sponsorship of a judicial candidate is in many ways a poor guarantee of a man's suitability for a judicial office, but nevertheless it is some guarantee, for when a man's name goes on the ballot under the party emblem he becomes one of the personalities on which the party stakes its hopes of securing or remaining in power. In the non-partisan election, a man's candidacy means no more than that he wants the office, and it may mean that he is not getting enough law practice to make a living. If he can win a judgeship, fine; if not, running for office is an ethical means of advertising, which may bring enough clients into his office to justify the effort even though it was foredoomed to failure.[15]

15. See "How to Be Elected Judge in Detroit," 12 J. Am. Jud. Soc. 186 (April, 1929); "Senator Burton's Confession," 26 J. Am. Jud. Soc. 68 (1942).

Furthermore, in straight party elections the party may be relied on to do at least a part of the candidate's campaigning for him, but under the non-partisan system every judicial candidate is on his own, and the natural result is for the office to go to the best campaigner, not to the candidate with the highest judicial qualifications.

In fact, the two are not natural partners, and the necessity of engaging in political campaigns keeps from judicial office some of the best potential judges in the country. A good friend of mine who is chief justice of a large eastern state has told me in detail of the distasteful requirements which his periodic campaign imposes upon him, of the neglect of judicial business which it necessitates, and of the considerable cost of getting re-elected—a cost which few people ever take into consideration when comparing judges' salaries with those of other people. A recent survey of Detroit courts suggests that "it is occasionally difficult, during election years, to obtain the undivided attention of the court personnel for the disposition of litigation," and the *Detroit News* calls this "perhaps the year's outstanding understatement."[16]

Then there is always the risk that in spite of a good campaign some unexpected landslide will sweep a judge out of his job in any election year and leave him under the necessity of going back into practice for a living in competition with younger men who have taken his clients while he was on the bench.

The Missouri Plan is a godsend to the judiciary in this respect. For a good judge, no campaigning is necessary beyond filing the declaration of candidacy, although re-election is not so automatic that a judge cannot be defeated for re-election, for that has already happened in one instance. The chief criticism in Missouri from a political standpoint has arisen out of the fact that no governor has yet made an appointment from the opposite political party. This is not as bad as it sounds, however, for the nominating commissions have in each instance recommended well qualified men from each party, and everybody concedes that the judges appointed have been good ones. Actually, since there have been governors from both parties, the judges are fairly well distributed, but it would not make much difference if they were all of one party, for they do not campaign for re-election and once in office their political affiliations become relatively unimportant.[17]

Finally, I suggest that a Missouri-type judicial selection plan will not deprive the people of any state of any meritorious feature of their present

16. Maxine Virture, *Survey of Metropolitan Courts: Detroit Area* (1950), p. 68.
17. See Laurance M. Hyde, "The Missouri Plan for Selection and Tenure of Judges," 9 Federal Rules Decisions 457 (1949) for analysis of election results under the Missouri Plan in 1942, 1944, 1946 and 1948. A complete catalogue of appointments under the plan was published in the December, 1950, Missouri Bar Journal.

elective system, but will on the contrary strengthen and effectuate them. It is not improper for free people to want to keep some measure of control over the judicial processes by which their lives, liberties and properties are disposed. When the judicial process is put effectually out of the reach of the people, the way is opened for abuses which in a past generation were symbolized by the words "star chamber" and today by those infamous perversions of democracy, the so-called "people's courts" on the other side of the world, and their enforcement arm, the secret police. In a state as modern and progressive as New Jersey, the new constitution of 1947 assumes that adequate popular control is provided by vesting the appointing power in the people's elected governor and holding him responsible for its abuse,[18] but the further safeguard of the popular vote for return to office in no way interferes with that responsibility and it not only offers the people an added safeguard, but it makes the achievement of judicial selection reform more feasible among people who are born and raised in the elective tradition.

These are serious times. The Korean "incident" of last summer has already spread into major military conflict with one of the greatest nations of the world. We know not what is in store for us during the coming months and years. There will be those who will urge now, as they urged a decade ago, that in such troubled times we should abandon thought of improvements and content ourselves with maintaining the status quo. I cannot share that view. In the first place, one of the objects for which our men are fighting is that man's never-ending quest for freedom and justice might be continued and not slowed down or halted. Furthermore, anything that can be done to perfect the institutions of America will make us better able to stand our ground in the global conflict of ideologies of which the shooting war in Korea is but one tangible outgrowth. It is because I believe that the institutions of justice are vital to the working of democracy, that the courts are no stronger nor better than their judges, and that anything that can be done to dignify, strengthen and protect them in their daily work of promoting American unity by smoothing out and resolving disputes among their fellow-Americans is a direct contribution to the cause of freedom, that I am doing what little I can to advance those ends. I hope you will agree with me and that you will join in that effort.

18. Text of judicial article, New Jersey Constitution of 1947, 31 J. Am. Jud. Soc. 142 (Feb., 1948).