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# A LAYMAN'S VIEW OF WYOMING JUDICIAL SELECTION

RUDOLFO MARTINEZ\*

One of the most pressing problems facing Wyoming voters is that of the selection of judges. A plan should be considered which will insure tenure on the bench and encourage more qualified people to seek the office. In the present non-partisan ballot plan, the person seeking office must conform to certain professional ethics and standards, yet appeal to an apathetic electorate. This method of non-partisanship leaves the voter with the confusing problem of voting for a candidate unknown to him. This situation needs urgent attention on the part of our citizenry.

This problem is not uncommon in the United States, for many of the states have experimented with various methods of selecting judges, hoping to bring about an effective and independent judiciary and still fulfill public sentiments for a popular election which is considered to be the basic feature of our democracy. Yet the crux of the matter is whether or not this plan stifles democracy by having an uninformed electorate select someone for the bench. These problems were quite evident during the August Primary of 1960. In this election there were three candidates seeking the eight year term for the Supreme Court. The two successful nominees received 4,993 and 3,242 votes in Natrona County. Yet, an examination of the election returns shows that an incumbent Republican legislative candidate polled 5,748 votes and an incumbent Democratic legislative candidate polled 5,099. Their combined total shows that at least 10,847 people from both parties voted. But at least 20% of these people did not bother to vote for the eight year-term judgeship. Another examination of the returns indicates that one of the well known nominees from Natrona County, the Honorable John J. McIntyre, polled 3,970 votes. The U. S. Senatorial races in the county indicated that two of the Democratic candidates polled 5,487 votes, while the successful Republican nominee polled 5,256 votes. Their combined total was 10,743; yet, the two judicial candidates polled a total of 6,944 votes.<sup>1</sup> In other words, nearly 35% of the people did not vote for this judgeship. This emphasizes the need for a more effective plan of judicial selection.

## BACKGROUND

States have always been confronted with the problem of judicial selection and different methods have been utilized. In seven states, judges are appointed by the governor and the legislature. In sixteen states, nominations are made at non-partisan primary elections, and the general

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1. Casper Morning Star, August 18, 1960.

elections also are non-partisan. Wyoming has this method of judicial selection. In seventeen states, nominations are made at political party primaries and the nominees appear on the ballot, opposite the party label, at the general election. In four states, the judges are selected by the legislatures, while five other states nominate the judges at political party conventions and the nominees appear on non-partisan judicial ballots at the general election.<sup>2</sup>

The basic problem comes about from the notion that popular elections in the judiciary will bring to the bench men who are concerned with the public good and are more responsive to the popular will.<sup>3</sup> Although this does happen in our political system, when it comes to judicial selection the electorate of Natrona County is guilty of negative voting, i.e., the failure to vote. The voters are expected to pass on the qualifications of men who, because of the law, cannot openly engage in partisan politics, and, because of the high standards of the legal profession, must campaign with less vigor than other public officials. This, instead of prompting an independent judiciary, provides a lethargic electorate.

#### MISSOURI PLAN

Some states have taken a pioneering step in the direction of providing good judges and also having them come before the public for its final acceptance or rejection. Such a plan was adopted in 1940, by the people of Missouri when a constitutional amendment was overwhelming approved. The outcome we know as "Missouri Plan for Selection of Judges." The plan works in this manner: Members of the Supreme Court and the three Appellate Courts of Appeals are selected by the Appellate Judicial Commission. The Commission is composed of three lawyers, each of whom is elected by the lawyers residing in his appellate district. It is also made up of three laymen, one from each district, appointed by the governor. The seventh member is the Chief Justice of the Supreme Court who is the chairman of the Commission. The Circuit Judicial Commission nominates the judges for the two circuit courts. This is made up of five members: Two lawyers who are selected by the circuit and two lay members who are appointed by the governor, while the fifth member is the presiding judge of the Court of Appeals of the district in which the circuit is located. He is chairman.<sup>4</sup>

Further, the plan provides that the members, other than the chairman, have six-year staggered terms so that no two terms ends in the same year. Members are not eligible to succeed themselves and serve only one term. No member of the commission, other than the chairman, may hold public office, and no member may hold any official position in any political party.

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2. Charles E. Kenworthy, *The Pennsylvania Plan to Divorce Judges from Politics*, 25 *Temp. L.Q.* 413 (1952).

3. Graves, *American State Government*, p. 609.

4. Douglas, *Missouri Plan Works Well In Action*, 23 *A.B.A.J.* 1169.

The next step is for the respective judicial commissions to select three persons possessing the qualifications of the office, and submit their names to the governor. The governor must appoint one from the list to fill the vacancy. After the person has been appointed, he must serve a probationary period of at least one year. He must then receive a sufficient affirmative popular vote at the next general election. At such an election he has no opponent, but merely runs on his record. His name is placed on a separate judicial ballot without any political affiliation. The only test asked of the voter is this:

Shall Judge ..... of the .....  
 ..... Court be retained in  
 office?  
 YES..... NO.....

If the vote is favorable the incumbent serves a full term, after which he appears before the voters on a similar ballot. Should the judge not be retained in office, then the appointing process is again employed.<sup>5</sup>

This plan combines the best features of the appointive and elective methods. It ensures that better judges are selected. It is democratic because the commission represents the people, the legal profession, and the bench. The fact that the people must later confirm the governor's choice makes certain the executive exercises caution in his appointment.<sup>6</sup>

Judge Douglas has remarked that in the first decade of its operation, the plan has enabled only lawyers with the greatest degree of integrity to be appointed. No commission selection has ever been criticized by the Bar, the press, or other institutions which reflect the public conscience.

Most important, this method frees the judge from the pressures of a campaign. It also prevents any candidate from utilizing methods unethical to the legal profession in seeking office.

#### OBJECTIONS TO PLAN

The plan has not gone without criticism. Perhaps the greatest objection has been that it tends to freeze a judge in office. But in answer to this, several attorneys who practice in that state were polled. The majority opinion is reflected in this evaluation given by a member of the Missouri Bar:

To secure the adoption of the plan in Missouri it was necessary to pay the penalty of freezing in office most of the judiciary then on the bench. I considered this no real objection because the men so frozen in office would have held their positions anyway until the landslide took place, in which case men of no greater merit from the opposite party would have been swept into office.<sup>7</sup>

5. *Ibid.*, p. 1170.

6. *Ibid.*, p. 1172.

7. Forty Lawyers Appraise Operation of California and Missouri Methods of Selection of Judges, 31 *J. Am. Jud. Soc'y* 176.

The plan, curiously enough, has never been criticized on the basis of its failure to bring into office competent, qualified people. Another appraisal was as follows:

Taking everything into consideration, the new Missouri system of selecting judges is about the best method that can be applied.<sup>8</sup>

The Missouri Bar is assisting the Court Plan during the judges bid before the people by taking an opinion poll of its membership and publicizing its results. This move aids the people in making their selection and places the responsibility of providing information on the Bar where it rightfully belongs.

This is a sample of the questionnaire used:

In your opinion has Judge ..... of  
the ..... Court demonstrated  
that he is qualified to be retained in office from the following  
standpoint:

- |   |          |                      |
|---|----------|----------------------|
| a) Legal ability?   | YES..... | NO.....              |
| b) Industry?  | YES..... | NO.....              |
| c) Judicial Temperament?  | YES..... | NO.....              |
| d) Integrity and strict impartiality?   | YES..... | NO.....              |
| e) Absence of political activity in judicial office<br>since adoption of Non-Partisan Court Plan?     | YES..... | NO.....              |
| Giving due consideration to all of the foregoing factors, should<br>Judge ..... be retained in office | YES..... | NO..... <sup>9</sup> |

#### A RECOMMENDATION FOR WYOMING

Because of the urgent problems in judicial selection facing the electorate of Wyoming, and, because of the efficiency of the Missouri Plan, it is recommended that similar non-partisan court plan be adopted in Wyoming. This plan could work in the following manner: First, a *district* Judicial Selection Commission should be appointed in each of the seven judicial districts. It should be composed of three attorneys selected by the Bar in each of the districts and three lay members appointed by the governor. The seventh member should be appointed by the chief justice of the State Supreme Court from its own membership. The commission would have the responsibility of selecting three people qualified for the office of judge of the district court and the list would be submitted to the governor. The governor then would select one for appointment.

Second, a *state* Judicial Selection Commission should be created composed of five lawyers from the state selected by the Wyoming Bar Association and five lay members appointed by the governor. The chairman would be the president, *ex officio*, of the Wyoming Bar Association. This Commission then would select three qualified people whenever a vacancy occurs in the Supreme Court. Their names would be presented to the governor for his selection of one.

8. *Ibid.*, p. 177.

9. Missouri Bar to Supplement Non-Partisan Court Plan with Bar Poll and Election Campaign, 31 *J. Am. Jud. Soc'y* 23.

No member of either commission could hold public or political office, except the Justices of the Supreme Court. The members should be appointed to six-year staggered terms so that no two terms ends in the same year. The probationary period of each newly appointed judge should be at least twelve months. At the end of this period, he should go before the people on a non-partisan ballot, with no opponent, for their acceptance or rejection. Te people should be asked only:

Shall Judge ..... of the .....  
 ..... Court be retained in office?  
 YES..... NO.....

The Wyoming Bar Association should take steps to inform the electorate of the qualifications of the judge in the manner most ethical to the legal profession. Perhaps a publicized poll of the membership, as in the case of the Missouri Bar, would be best. This plan is the only tested method to end the serious problem of negative voting in a democracy. It would enable brilliant and qualified attorneys to reach the bench who otherwise might be reluctant to seek the office because of the campaign.

Such a plan undobutedly will be criticized on grounds that it removes from the people the right of selection. However, this criticism is unfounded. The commission would be representative of the people since the laymen are non-lawyers. In addition, the judge comes before the people solely on his record on the bench. This method certainly gives the people the final say in the selection.

Dean Roscoe Pound had the answer when he said, "Too much thought has been given to the matter of getting less qualified judges off the bench. The real remedy is not to put them on."<sup>10</sup>

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10. Hyde, Judges: Their Selection and Tenure, 12 N.Y.U. L.Q. Rev. 393.