Marquette Law Review

Volume 34
Issue 4 *Spring 1951*

Article 5

1951

Judicial Selection

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JUDICIAL SELECTION

The importance of establishing methods of judicial selection that will be most conducive to the maintenance of a thoroughly qualified and independent judiciary and that will take the state judges out of politics as nearly as may be, is generally recognized.

The method of selecting judges now used in Wisconsin is by direct nonpartisan election. The original constitutional provision for selection of judges in Wisconsin provided for election with no prohibition as to partisan campaigning. Thus although the present provision for nonpartisan elections has made judicial candidates free from party influences it still necessitates a campaign in which political support is required even though nonpartisan.

Article VII in the Wisconsin Constitution which provides for the election of judges, was by no means unanimously approved and passed. The Committee for the formation of the mode of selecting judges was appointed on October 8, 1846[1]. After several months in Committee the article was submitted to the Wisconsin Constitutional Convention for consideration and adoption. Several motions were made to amend the proposed article to incorporate a provision for the appointment of judges, rather than for the election of judges; but they were all voted down after spirited debate and the article as it stood was submitted and passed on December 2, 1846[2].

The fact that the mode of selecting judges was controversial is evidenced by the language used in the Majority Report of the Committee on the Method of Selection of Judges, of the Wisconsin Constitutional Convention. The Committee said in its report:

> "But there is one feature in the judicial system proposed for adoption by the majority of the Committee, so prominent and important, and upon which so decided a difference of opinion exists, that it demands a more minute and extended examination. It is the election of judges by the people. This principle lies at the foundation of the whole superstructure, and it is of the first importance to ascertain whether it is sound and correct."[3]

The reason for the prominence and importance of the mode of selection of judges was the fact that the traditional mode of selection of judges, appointment by the executive, began to be abandoned in many states during this period when the impact of the Jacksonian democracy provoked a conflict "over what was variously called the 'independence'

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[1] Journal of the Convention, 1846, p. 24.
[2] Journal of the Convention, 1846, p. 378.
[3] Journal of the Convention, 1846, p. 108.
[4] Minimum Standards of Judicial Administration, Edited by Arthur T. Vanderbilt. Law Center of New York University, p. 4.

or 'irresponsibility' of the judiciary," and resulted in most states in a shift to popular, partisan election of judges.[4]

The Majority Committee before arguing the relative merits of any system of selecting judges first set up the requirements for a good judiciary which are as follows,

> "to render any judicial system popular and highly useful, it must secure the services of the best men for judges, it must administer justice without delay and as nearly as may be at every man's door."[5]

This definition although laid down in 1846 appears as sound today as it did when it was propounded. The Committee then further laid down a definition of a good judge which as as follows,

> "He alone can be a popular judge who is honest, impartial, decided and fearless, who holds with a steady hand the scales of justice and will suffer no improper influence to approach them, whose judgment, though it may sometimes waver and tremble in doubt, ultimately points steadily to the pole of eternal truth and justice."[6]

Again, the definition set down by the Committee appears as sound today as it did when it was written in 1846.

After setting up the requirements for a good judiciary and individual judges, the Majority argued for the establishment of a mode of selecting judges based on election by the voters of the state. A reason given for abandoning the traditional mode of selecting judges, that of appointment, was that party spirit and improper influences would have less scope for exercise in the election, than in the appointment of judges; and that the people would be more attached to a system so democratic in principle, and would more cheerfully acquiesce in the decisions of a court selected by themselves.[7] Further, the Committee thought that the election of judges to administer the laws in the high tribunals of the state, who would sit in judgment on the rights, the lives and liberties of each elector, on a day expressly set apart for that single object, is an act too solemn to admit of undue bias from the heat of partisan feeling, or the efforts of demagogues.[8] These arguments used by the Majority are the weak points of the report which favored the adoption of election of judges. The Majority report closed with the statement that selection of judges by election is not a novel scheme now for the first time sought to be engrafted into constitutional law, and that it has been successfully tried to its full extent in the state of Mississippi, and partially in Michigan, and in other states.[9] Thus it would seem, Wisconsin now has the

[5] Journal of the Convention, 1846, p. 107.
[6] Journal of the Convention, 1846, p. 111.
[7] Journal of the Convention, 1846, p. 111.
[8] Journal of the Convention, 1846, p. 110.
[9] Journal of the Convention, 1846, p. 112.

direct election mode for selecting judges as a result of a temporary and popular political philosophy which had as its roots the political doctrine of rotation in office, which was commonly expressed in the slogan, "To the victor belongs the spoils."

A person might well ask, Why change from direct election to appointment of judges? The answer is that direct election of judges is not desirable. There are many arguments to be made in favor of this position. More forceful than any argument, perhaps, is the fact that a survey made by the Special Committee on Judicial Selection and Tenure of 1938 disclosed that in the ten states where most judges were not selected by popular election, the courts were able and respected by the bar and the people and all attempts to substitute the elective method had been rebuffed, whereas in eighteen states movements were or had been under way to substitute some other method for direct election and in all but six of the remaining twenty states, dissatisfaction with the courts and with the administration of justice had been expressed. In the thirteen years since then, the movement for substitution of some type of an appointive system for direct election has gathered momentum, while there still has been little or no demand for change in the states employing an appointive system.[10]

The chief reason for rejecting the theory of direct election of judges is that it puts the judiciary into politics. As Judge Henry T. Lummus of the Supreme Judicial Court of Massachusetts has said:

> "There is no harm in turning a politician into a judge. He may become a good judge. The curse of the elective system is that it turns almost every elective judge into a politician."[11]

Judges should not be selected for partisan or political considerations. A candidate for a legislative or executive office may run on the basis of his advocacy of particular policies; a judge can have no "policy" other than his ability to administer the law honestly and competently. Judges should not be influenced by political alliances or political debts.

Good judges may be elected by popular ballot, but bad ones often are; the general public in the nature of things cannot be adequately informed as to whether a candidate is a man of personal integrity, whether he has adequate legal training and judicial temperament, and too often the race goes to the man who has secured the greatest degree of personal publicity or notoriety rather than to the best judicial timber. A picture on a telegraph pole does not convey adequate information as to qualification for judicial office. Indeed, considerations of financial return aside, the best men often will not become candidates because of

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[10] Minimum Standards of Judicial Administration, Edited by Arthur T. Vanderbilt. Law Center of New York University Pres. Ch. 1.

[11] The Improvement of the Administration of Justice, (A Handbook prepared by the Section of Judicial Administration, of the A. B. A.) p. 77.

the distastefulness of making a political campaign for a judgeship, and if they did run would often have no chance of success in a political contest. Once on the bench, also, the judge should be free to make his decisions in accordance with the law and the facts as he sees them; he should not forever have to trim his sails lest he incur the opposition of some powerful force which might turn him out at the next election.

Selection of candidates by party leaders in partisan elections does not obviate any of these objections, although it is at least possible for abler judges to be chosen in this manner.

It may be objected that democracy demands direct election of judicial officers; that an appointive system will result in a conservative or reactionary bench; that the bar, a conservative force at best, will exert undue influence in procuring appointments. The first of these arguments has been pretty well exploded. There is nothing in the concept of democracy that requires direct intervention by the voters in every aspect of government; and in practice the voter either takes the candidate offered him by the political leaders, or—under the direct primary—chooses, if he votes at all, on the basis of insufficient knowledge or cheap publicity. The argument as to the influence of the bar, whether valid or not, is met by the mechanics of the A. B. A. Plan, which provides for appointment from a list of men selected by an agency composed of laymen and judicial officers.

For some time in the past and at the present time the American Bar Association has been formulating and advocating changes in the Legal System of our Country which are aimed at making our system as economical, efficient and just as possible. After an exhaustive and thorough study and appraisal of the methods used in selecting judges, the American Bar Association adopted in 1937 a method of selection which it recommends as the most efficient and acceptable sustitute available for the direct election of judges. This method of selection which is called the A. B. A.Plan is 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 officers and in part of other citizens, selected for the purpose, who hold no other public office.
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> (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 made through the dual agency suggested.
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> (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 candidate,

the people voting up the question, "Shall Judge Blank be retained in office?"[12]

The main features of the plan as quoted above are (1) appointment by the Governor from a list submitted by a nominating committee, the nominating and appointing authority being divided between two agencies; (2) periodic submission to the electorate with no opposing candidate, or "running against the record."

1. *Dual nominating and appointing agency.* . If judges are not to be elected they must be appointed. Election by the legislature works fairly well in those few states employing it but is not likely to be adopted elsewhere. Appointment by the Chief Justice is not desirable. In most states the appointing power will be vested in the Governor. In order to secure the best choice of names, the executive should not have an unlimited power of selection, but should be confined to a panel of names chosen by a separate nominating agency. The use of two agencies will diminish the opportunity for control of selection by special interests, individuals or groups; it will provide checks and safeguards against hasty or ill-considered action; it will insure a careful screening of possible candidates; and it has the very practical advantage of making the plan more acceptable to the electorate. For this latter reason, also, the nominating body should not be composed solely of lawyers and judges. The bar has a tendency to feel that only lawyers are capable of selecting the best judges. This is not true, and the lay public is not likely to agree. The nominating body should consist equally, if not predominantly, of laymen elected by the voters or appointed by the Governor, and serving without pay. If the state has a judicial council meeting these qualifications it may well serve as the nominating agency. Nomination by a body of this sort, composed of high caliber men, should not only produce better judges but also remove any likelihood of improper motivation in their selection.

2. *Periodic reappointment or reelection.* The general public is not ready to accept a life tenure system as to state court judges and it may be doubted whether such tenure would be desirable. Greater security of tenure than exists under the elective systm in most states is, however, essential to improvement of the caliber of judges. The ideal solution is to provide that, after a specified period of service, and periodically thereafter, the appointee should either come up for reappointment or should go before the people at a general election on the basis of his record and with no opposing candidate. The latter alternative is probably preferable, especially since it retains for the voters an opportunity to participate in the process of judicial selection in about the only way in which they can effectively do so. The able judge has little to fear

[12] Minimum Standards of Judicial Administration, p. 3.

from such a system, while it does permit removal of a judge whom experience has shown to be plainly unqualified or who has become unfit to continue on the bench.

3. *Legislative confirmation.* Under the A. B. A. Plan it is optional whether or not to include a provision for confirmation of appointments by the legislature. Inclusion of such a provision may be thought necessary in order to obtain adoption of the plan. However, this has several undesirable features. In most states the legislature is in session only for a few months every two years, so that insecure interim appointments must be made if vacancies are to filled as they occur. Too, subjection of judicial appointments to legislative confirmation opens the door to political deals and log-rolling.

Thus while appointment to judicial office rests with the executive originally, his discretion is limited, and the appointee at the end of a certain term may be retained or discharged by the people. Although final control rests with the people, the difficulties interposed by party politics and inherent in direct nomination and popular election are obviated.

At the present time in Wisconsin a movement is under way to have adopted the A. B. A. Plan for the selection of judges. This movement is supported by the Milwaukee Bar Association and many judges and members of the state bar and laymen who are interested in having in Wisconsin the best possible legal system and the ablest and best qualified men administering the law under that system. A bill embodying the A. B. A. Plan has been drafted and will be submitted in the near future to the legislature of Wisconsin for its consideration in the hope that a joint resolution will be passed putting the matter of constitutional amendment before the people. If a joint resolution is passed it will be the duty of the bar to inform the public of the relative merits of the direct elective method and the A. B. A. Plan so that the issue thus raised will receive the benefit of intelligent voting.

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