JUDICIAL SELECTION AND TENURE

BY EDWARD B. LOVE *

THIS ARTICLE WILL CONSIDER briefly the following points: the background of the problem of selecting judges, the history and development of the direct election of judges in Illinois and elsewhere, the defects in such election, the need for improving the present method of judicial selection, and a comparison of the sections of the judicial article now offered jointly by the Chicago and Illinois State Bar Associations relating to judicial selection and tenure with the American Bar Association plan of judicial selection.

THE PROBLEM

Since recorded history began, peoples of all races have unanimously and fervently desired judges who could be trusted to judge justly. The Egyptians made judges only from among rich men on the theory that they could not be tempted. [1] Socrates refused to appeal for his life to the judges' emotions lest they be tempted to judge him contrary to the laws they were sworn to support. [2] And twenty-four hundred years ago Xenophon observed that, "It is nonsense that the city magistrates (of Athens) should be chosen by lot, when no one would think of drawing lots for a navigator, a bricklayer, a flute player, or any other craftsman whatever, whose faults are far less harmful than those which are committed in government." [3]

Down to our own times, the problem of getting good judges has preoccupied the best minds. The extensive literature on the subject, as measured against experience with various methods of selecting judges, has all been brought together by the American Bar Association in formulating its conclusions.

It should be noted at the outset that today twenty-one states have direct election of all judges, but that this system is in use nowhere else where the common law prevails. [4]

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[1] BREASTED, DAWN OF CONSCIENCE, 155.
[2] PLATO, APOLOGIA.
[3] XENOPHON, MEMORABILIA, 1, 2, 9.
[4] AMERICAN BAR ASSOCIATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 81 (3d ed. 1952).

Lawyers require no demonstration that today's methods of selecting judges in Illinois are fundamentally different from those our forefathers knew. Today's methods are not sanctified by the Federal Constitution, which confers no franchise, nor even by particularly ancient usage in the states.

WHY WE HAVE DIRECTLY ELECTED JUDGES

It is common knowledge that the basic right to vote in each of the original states in 1776 was strictly qualified rather than general. Colonial voters and office holders were generally required to be "free men" or "free holders" which then signified persons of recognized responsibility. To this was commonly added a requirement that a voter or office holder own rather substantial minimal property. This was the situation existing and recognized when the Federal Constitution was framed in 1787, based not on federal but on state control of the franchise. The trend toward removal of the property ownership requirement began in 1801 in Maryland when Jefferson's inauguration foretold the new democratic spirit, but did not become general until the middle of the last century. Even today, twenty-two states insist on tax or property tests, ranging from a pure poll tax, to a taxpayer's status and to ownership of real estate of minimal value. [5] This extension of the suffrage to all residents old enough was vainly resisted by some of the ablest men of that day and has produced results not then foreseen in our state and national life. However our interest in this phenomenon must be here limited to its effect on the selection of judges.

ILLINOIS JUDGES NOT ELECTED UNTIL 1848

Nevertheless, the first Illinois Constitution of 1818 guarded the judiciary from exposure to the general suffrage by providing that, "The justices of the supreme court and the judges of the inferior courts shall be appointed by joint ballot of both branches of the general assembly, and commissioned by the governor, and shall hold their offices during good behavior . . . ." [6]

So, it was not until the adoption of the Constitution of 1848 that Illinois judges were elected by a popular vote of electors who were required to have only age, sex, and residence qualifications. [7]

Thus, Illinois judges have been selected by popular ballot for 104 years, but it was not the intent, nor the expectation of the founding fathers that this should be so, and those who drafted the first Illinois constitution provided directly otherwise. In fact, the personnel of both houses of the Illinois General Assembly from 1818 to 1848 was composed mostly of

[5] ENCYCLOPEDIA AMERICANA, 71.
[6] ILL. CONST. Art. IV, § 4 (1818).
[7] ILL. CONST. Art. VI, § 1 (1848); ILL. CONST. Art VII, § 1.

lawyers so that a portion of the bar thereby, in considerable measure, chose the judges.

THE INDUSTRIAL AND JACKSONIAN REVOLUTIONS

By 1818, when Illinois adopted its first constitution, the wave of democratic revolution sweeping the world persuaded its framers to remove all property and other such qualifications from the franchise, leaving only requirements as to sex, age, and residence. The same was true of office holders. Curiously enough, it appeared to be unpopular to prescribe qualifications for the bar and for the bench in the new state constitutions. The tremendous upheavals of the industrial revolution were the precursors of the era of Jacksonian democracy during which Andrew Jackson did much to fix the public criteria of the bench and bar on the basis of his own meager legal knowledge and talent.

> "Where Jefferson had wisely proclaimed that all men were created equal, the politicians of the Jacksonian era asserted that all men were in fact equal. Lawyers were despised, ostensibly for assuming to know something ordinary men did not know, but actually because they often appeared for unpopular creditors. Judges were subjected to another and more fatal line of reasoning: if all men are equal, all lawyers, being men, are equal, and so one lawyer was as much entitled to be a judge as any other, if the public so willed. Hence, elections for short terms and rotation in office so that each lawyer has a better chance to be elected a judge and, above all, that every judge should be 'kept close to the people,' even at the cost of becoming a partisan, participating in frequent campaigns and political manoeuvring at the price of his independence. That an elected judiciary has proved workable at all has been due to such factors as the gradual extension of judicial terms, the movement for non-partisan judicial nominations, the impartial endorsements of judicial candidates on the basis of professional standing by bar associations and civic bodies and almost everywhere the appointment by governors of many lawyers of high standing to fill the numerous vacancies in judicial office for which they would never have been willing to campaign." [8]

Whatever the reason, the Illinois Constitutions of 1818, 1848, and 1870 provide at no point, directly or indirectly, that any judge or justice be a member of the bar. So far as the constitutional language reads, any judge of any court, including the Supreme Court, could be a layman. This appears to be commonplace in the wording of other state constitutions. No such doubts appear in the judicial article now jointly proposed by the Illinois State Bar Association and the Chicago Bar Association in which Section 18 provides:

[8] VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION, xxiii, xxiv (1949).

"No person shall be eligible for the office of judge or magistrate unless he shall be a citizen of this state and a member of its bar."

Since the present method of selecting judges in Illinois is hallowed by nothing more than long habit, we presume to examine present methods dispassionately and on the basis of merit.

POPULAR ELECTION OF JUDGES NOT A REALITY

There is yet another basis for consideration of methods of judicial selection more fundamental than merit, habit, or even the sacrosanct original framework of our government and that is the existing fact that there is no real popular selection of judges. No Illinois voter could be persuaded that the electorate today actually selects the judges nor even that it has any great voice in the matter. Surely every adult in Illinois is aware that judges are generally selected by those who happen to control party organizations and machinery and thereby control judicial conventions and their delegates. The voters' participation in the selection only begins when the public chooses between the parties' respective candidates. Even that much participation is dispensed with in the so-called bi-partisan judicial elections in Cook County where the practical choice is nil. To that extent, the claim of any popular selection of judges in Illinois is a sham and a delusion. If that be the fact, then it must be conceded that almost any system would be preferable to that now in actual operation.

But, it may be argued that Illinois has good judges and that they were produced by the system of party responsibility now in actual use. Therefore, the proof of the pudding is in the eating. *Ergo,* the system works well, so why should it be changed, since it might have been worse?

Who knows what the *public* really thinks about it? If we had had a different system of selecting judges, who knows whether our judges would have been better or worse—whether the courts would have been more or less respected—whether litigants would have been more or less satisfied with the work of the courts—whether public opinion of law, lawyers, judges, and courts would have been higher or lower?

THE RESPONSIBILITY OF THE BAR

Thus, both sides yield to speculation and the *public* itself must be the final arbiter. A dread and inexorable arbiter it may be although it has thus far given the profession plenty of time and plenty of rope to prove or hang itself. The electorate has confided a monopoly and a public trust in the profession to administer the justice which it demands, but which it only intuitively comprehends. Nothing so outrages the individual, and the public as a whole, as lack of justice. The average citizen understands much better than lawyers that "justice delayed is justice denied." The sword of

Damocles that hangs over the head of our profession is the power of an aroused public that is infinitely more opened-minded about how justice should be administered than is the profession and that is in a much greater hurry to reform that administration if it is sufficiently unsatisfactory and this without regard to what may be the opinion of the bench and bar.

Be it not forgotten now that the present judicial article was condemned on all sides and defended on none during the 1949 debates on a constitutional convention.

It seems a fair historical observation that in all periods of turmoil, when political, social, and economic ideas are in ferment, the personnel and procedure of the courts are invariably attacked.

In this day when the eternal verities are challenged at every turn, the bench and bar cannot blandly assume, simply because they consider their opinion best, or even because it is best, that their judgment will be accepted. Tradition and habit are strong in the judge and the lawyer, but do not cling so tenaciously to the average citizen. The latter is not so likely to endure the law's delays and inadequacies as were his parents and his grandparents. Today's citizen is a hurrying citizen. He demands speed in all things and even in courts and judges. He will not buy a slow car nor a slow court system. Successful businessmen give their customers what they want—or fail. The voters are our customers. It is more sensible and easier to give them what they want than to defend an unpopular product.

The unadorned fact appears to be that the profession (judge and lawyer alike) has the commission to administer justice and with it the concomitant responsibility to do whatever is necessary to produce a high level of results, expeditiously and efficiently—or else.

So time appears to be running out and we must consider this matter, even prayerfully, in the light of current efforts to socialize the professions which are subjected to pressures they never knew before. The development of administrative tribunals, the so-called "court packing plan," and the "Steel Seizure Case" may well be omens of troubles that lie ahead, and our ship must be trimmed against whatever storms may be brewing.

Most properly, then, these two bar associations have assumed the responsibility of framing and proposing a plan for reorganizing the court system of this state. It has required more than two years of intensive work. Each lawyer in Illinois could probably find some part of the plan he would like to see changed. Such a process could go on forever. There may be those who would be pleased if it did go on forever, but good faith will surely limit them to a tiny minority. Therefore, this comment will concern itself, not with improvements and embellishments, but with the manner in which this proposed judicial article for Illinois measures up against the standards of judicial selection and tenure which the American Bar Association has developed from experience in all the states over the years.

THE AMERICAN BAR ASSOCIATION'S CONTRIBUTION

It is in order to observe that the entire subject of the administration of justice has been under continuing close scrutiny and analysis for the past sixteen years, not only by the American Bar Association Section of Judicial Administration, but also by its Standing Committee on Judicial Selection, Tenure and Compensation, as well as by the American Judicature Society for a longer period than that.

The over-all objectives of the American Bar Association in the field of judicial administration, as developed and urged by its Section of Judicial Administration, include the program of the Standing Committee on Judicial Selection, Tenure and Compensation and may be briefly stated as follows:

1. The integration of the judiciary through the establishment and active functioning of judicial councils, judicial conferences, the administrative judge, and administrative office of the courts.
2. The delegation of the rule-making power to courts of highest jurisdiction, and through the exercise of that power, the consequent improvement of pleading, trial practice, and appellate procedure.
3. The improvement of the jury system and the methods of the selection of jurors.
4. The simplification of the law of evidence.
5. The improvement of administrative tribunals and the practice before them.
6. The improvement of methods of judicial selection.

In addition to the foregoing objectives, the Section and the Association have progressed far with continuing programs based on analysis and study of metropolitan trial courts and on improvement of the traffic and justice of the peace courts.

While much of this program and these objectives are beyond the scope of this paper and of the proposed sections to which it relates, yet we cannot forbear observing with satisfaction that the entire judicial article proposed satisfies as many of these objectives as are within its compass.

> "Many of the specific proposals discussed . . . have already been considered in each state. Some of them have been adopted; others are currently under consideration or are being aggressively promoted. It is not necessary to start from scratch. It is recommended, however, that the whole program be reviewed anew. Much can be learned as to the methods to be used in securing the adoption of the program from the experience of the past fifteen years. What was thought unfeasible in a particular state in 1939 may on a second look appear entirely practical now. The 1938 recommendations of the Section of Judicial Administration are every bit as sound today as they were when they were formulated; their realization is only the more urgent because the be-

ginning of another decade of this 20th Century finds us with still too many relics of the 19th Century in our system of judicial administration." [9]

Chief Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit, former Chairman of the Section, in his 1941 address on "Improving the Administration of Justice," [10] spoke directly to this point:

"I conclude with two thoughts. The first is that, if the lawyer wishes to preserve his place in the business life of the country, he must improve the administration of justice in which he plays so important a part and bring it into harmony with that life. If he imagines that the present functioning of the courts is satisfactory to the people, he is simply deluding himself. Workmen's compensation commissions were established very largely because the courts were not handling efficiently the claims arising out of industrial accidents and it was felt that they would not administer the compensation acts as efficiently as administrative bodies. Business corporations are willing, as all of us know, to suffer almost any sort of injustice rather than face the expense, the delay and the uncertainties of litigation. Arbitration agreements are inserted in contracts with ever-increasing frequency; and every such agreement is an implied affirmation of the belief that lay agencies for attaining justice are more efficient than the courts. Let me remind you that the administration of justice is the business of the lawyer as well as of the courts, and that if he does not wish to see his business slip away from him, it behooves him to go about it in an efficient and businesslike way.

"But there is a higher ground upon which I would base my appeal. If democracy is to live, democracy must be made efficient; for the survival of the fit is as much a law of political economy as it is of the life of the jungle. If we would preserve free government in America, we must make free government, good government. Nowhere does government touch the life of the people more intimately than in the administration of justice; and nowhere is it more important that the governing process be shot through with efficiency and common sense. We lawyers must help in every way that we can to meet the force of totalitarian states and to refute the slavish philosophy on which they are founded; but nothing else that we can possibly do or say is so important as the way in which we administer justice. The courts are the one institution of democracy which has been intrusted in a peculiar way to our keeping."

It is noteworthy that the only two national organizations devoted to improvement of the judicial process, the American Bar Association and the American Judicature Society, have constantly campaigned for adoption of the American Bar Association Plan. No known organization opposes it.

[9] AMERICAN BAR ASSOCIATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE, 9 (3d ed. 1952).

[10] 27 A.B.A.J. 71, 76 (1941).

THE A.B.A. PLAN

At the meeting of the House of Delegates of the American Bar Association, held in Columbus, Ohio, on January 6th, 1937, the following resolution was adopted:

"WHEREAS, 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; and

"WHEREAS, In many states movements are under way to find acceptable substitutes for direct election of judges; now, therefore, be it

"*Resolved*, By the House of Delegates of the American Bar Association, That in its judgment the following plan offers the most acceptable substitute available for direct election of judges:

"(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.

"(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.

"(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 upon the question 'Shall Judge Blank be retained in office?'" [11]

This is the American Bar Association Plan of Judicial Selection which the Association has promoted militantly since 1937.

THE NATIONAL SITUATION

The existing situation in the forty-eight states has been described as follows: [12]

"Briefly stated, and speaking first of formal matters, all judges are elected by the people in twenty-one of the states, as are all except some of the inferior court judges in fourteen others. This leaves thirteen. In one of these (Connecticut), most judges are appointed by the Governor with the consent of the General Assembly, *i.e.*, both houses of the legislature. In Delaware and New Jersey nearly all are appointed by the Governor with the consent of the Senate. In Maine, Massachusetts and New Hampshire, most of them are appointed by the

[11] *Report of the Special Committee on Judicial Selection and Tenure*, 62 A.B.A. REP. 893 (1937).

[12] AMERICAN BAR ASSOCIATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE, 81-88 (3d ed. 1952).

Governor with the consent of the Governor's Council. In four states (Rhode Island, South Carolina, Vermont and Virginia), virtually all are elected by the two houses of the legislature in joint meeting. In Florida, the judges of the Supreme Court and of most of the inferior courts are elected by the people and those of the principal trial courts and of a few inferior courts are appointed by the Governor with the consent of the Senate. In California the judges of the Supreme Court and of the District Courts of Appeal (intermediate appellate courts) are, by virtue of a recent constitutional amendment, appointed by the Governor with the consent of a commission of three *ex-officio* members: the Chief Justice or acting Chief Justice, the Attorney General, and the Presiding Justice of one of the District Courts of Appeal. [HAYNES, THE SELECTION AND TENURE OF JUDGES, 9, 10 (1944).] (The Missouri system is described below.) This situation remains the same except in Alabama, which in November, 1950, became the third state to adopt a version of the American Bar Association Plan for selection of judges. Under the amendment adopted by the voters, by a vote of 44,000 to 38,000, vacancies occurring on the bench of the Circuit Court in Birmingham are filled by appointment of the Governor from a list of three nominations submitted to him by the Jefferson County Judicial Commission, consisting of two members of the bar, two laymen and one judge of the court.

"The application of the plan to other courts and the feature of the appointed judge being required to run on his record and without a competing candidate at the end of his term which were parts of the original proposal were sacrificed in the course of the campaign to make possible the adoption of the remainder.

"In very few states do judges enjoy tenure during good behavior, although in a good number of jurisdictions the tradition of re-election of incumbent judges in effect achieves that result.

Why Is a Change Needed?

"The implicit major premise of the resolution set out above 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 in 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 ten 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.

"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.'

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 a 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 one of 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 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 does not obviate any of these objections, although it is at least possible for abler judges to be chosen in this manner.

"It will 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 second argument is refuted by Professor Evan Haynes in his book on selection of judges referred to above. The argument as to the influence of the bar, whether valid or not, is met by the mechanics of the A.B.A. Plan as described below.

The A.B.A. Plan

"The plan for judicial selection sponsored by this Association is set forth in the resolution quoted above. The main features of the plan

are (1) appointment by Governor from 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 predominately, 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.

"The California plan, used in that state for appointment of judges of the appellate courts, provides for appointment by the Governor subject to confirmation by a board. This is not as satisfactory as the A.B.A. Plan; such a board will naturally be loath to reject a nominee if he is at all qualified, especially where the nomination is made public before the board has acted, so that confirmation tends to become a 'rubber-stamp' affair.

"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 system 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 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 be filled as they occur. Too, subjection of judicial appointments to legislative confirmation opens the door to political deals and log-rolling.

"Missouri's constitutional provisions first adopted in 1940 contain both of the essential provisions advocated by the American Bar Association. It is accurately described by Judge Laurance M. Hyde of the Supreme Court of Missouri [Hyde, *Judges: Their Selection and Tenure*, 30 J. AM. JUD. SOC'Y, 152, 156 (1946).] in the following words:

" 'All of our appellate courts are under the new Plan; but only the trial courts (circuit courts) of St. Louis and Kansas City are under it. As to all other trial courts (circuit courts) of the state, it is optional with the voters of any circuit to adopt it in a local option election if they want it.

" 'Under our plan, selection is made by the governor's appointment, but from a list of three names submitted to him by a Selection Commission. The Selection Commission, for our Appellate Courts (the Supreme Court and three Courts of Appeals), is composed of the Chief Justice of the Supreme Court as chairman, three lawyers elected by the bar, and three laymen appointed by the Governor. The members, other than the Chief Justice, have six-year terms, staggered so that one term expires at the end of each year. These members are not eligible to succeed themselves. The lay members are appointed by the Governor, one every two years, each from a different Court of Appeals district. The lawyer members are elected, one every two years, by the members of the bar of the Court of Appeals district which they represent . . . . The Selection Commissions for the city trial courts have five members. They are, the presiding judge of the Court of Appeals of the district in which the city is located, as chairman, two laymen appointed by the Governor, and two lawyers elected by the bar. They also have six-year terms which are staggered so that the term of each member expires in a different year. Members of these commissions are limited to one term, and no governor can appoint all of the lay members of these commissions, because our Governor has a four-year term and cannot succeed himself.

" 'The next step, after a judge has been appointed from the list submitted, is that when he has served one year, the people vote at the next general election, following such year of service, upon the question of whether or not this judge shall have a full regular term

(trial courts, six years; appellate court, twelve years). Thereafter, a judge given a full term must, at the expiration of each term, submit his declaration of desire for another term to be voted on by the people. Likewise, all judges in office at the time the amendment was adopted were required to be voted on by the people to get another term. At all such elections, the judges' names are placed on a separate judicial ballot, without party designation, the only question submitted being: "Shall Judge..... of the.....court, be retained in office? Yes. No." '

Ways and Means

"The best of plans for improvement of selection of judges is of no value if its adoption cannot be secured. Of equal importance with the drafting of a sound plan is the careful laying out of battle lines for the campaign to achieve adoption.

"It cannot be over-emphasized that too great precipitancy and lack of sufficient preparation in putting forward a plan for judicial selection will set the movement back. The bar as a whole must be persuaded of the need for a change and of the necessity for their vigorous support. Cooperation of the press should be sought. Civic organizations and groups should be invited and encouraged to participate in the discussions. 'It is believed to be the part of wisdom to proceed with caution—even with attending delay—in an effort to secure the active and effective aid of other groups rather than to press forward with undue haste in the proposal of a plan which may not meet with their approval and for lack of supporting public opinion, fail of accomplishment.' Opposition should be anticipated and plans made to meet it; the proposal itself should be carefully drawn so as to avoid unnecessary criticisms. When the time comes to put the matter before the legislature or the people, adequate means of publicizing the arguments in favor of the proposal should be provided.

"In states having both metropolitan and rural sections it may be advisable, at least in the beginning, to limit the plan to appellate judges, with provision for its extension to trial judges by local option. If conditions in the state seem to make it impossible at present to obtain adoption of any appointive system, interim steps may be taken to improve the existing situation, such as the use of bar plebiscites, discouraging of contributions by lawyers to judicial campaign funds, improvement of the elective system itself, etc. And, while discussion is beyond the scope of this handbook, adequate judicial salaries and pensions are of course essential under any system.

What Has Been Done

"Progress in reforming judicial selection is slow. As yet only Missouri has adopted the A.B.A. Plan (in 1940). A related system was adopted for appellate court judges in California (1934). The voters rejected similar plans in Michigan and Ohio some years ago. But the

ferment is working. In many states where the elective system was regarded as hopelessly entrenched fifteen years ago, vigorous efforts are now being made to secure a change. Utah by constitutional amendment in 1944 authorized a system of non-partisan selection of judges, and this has now been implemented by legislation. Strong campaigns have been or are being carried on in Arizona, Alabama, Arkansas, Colorado, Pennsylvania, Texas and Washington and more limited campaigns in Connecticut (minor court judges), Illinois and Ohio. Organized efforts are reported in Idaho, Kansas, Montana, Nebraska and West Virginia.

"The experience in Missouri demonstrates the value of the system. The proposal was originally adopted by initiative; two years later, a repealing amendment placed on the ballot by a bare majority of the legislature was defeated by a much larger plurality than the original proposition had received. At the first election under the plan all but one of the incumbent judges were retained; the one rejected was generally regarded as unqualified. Better qualified men have been placed on the bench and even the incumbent judges have improved now that they need no longer act from political considerations or keep up political fences."

The foregoing summary by the Section was made before the recent unsuccessful campaign in New Mexico and the development of strong campaigns in Michigan and other states.

ILLINOIS PROPOSAL VERSUS MISSOURI EXPERIENCE

Examination of the relevant sections, (11 to 18, inclusive), of the proposed judicial article for Illinois discloses substantial fidelity to the principles of the American Bar Association Plan. Several differences appear between the proposed sections and the comparable Section 29 of Article V of the Missouri Constitution. The importance of these divergencies lies in the fact that Missouri has operated successfully under the American Bar Association Plan since 1940 and comparable experience exists nowhere else with the plan.

That part of each of the judicial articles thus compared which relates to the selection and tenure of judges begins with the same phrase, "Whenever a vacancy occurs in the office of a judge . . .," but thereafter the provisions are arranged differently.

The Illinois provisions are shorter than those of Missouri, but it is ordinarily sound constitutional draftsmanship to leave details to the legislature and not to burden these sections with what may properly be statutory material.

The Missouri Article limits the operation of the plan to the seven judges of the Missouri Supreme Court, the three judges each of the three Courts of Appeal, and to the twenty-eight trial or circuit judges and the probate and

criminal judges in the two largest cities, St. Louis and Kansas City. It may be extended by local option to any other circuit.[13] No such piecemeal arrangement is proposed in Illinois. Possibly, it will be argued that it is not necessary to take the judges out of politics in downstate Illinois, based on the claim that downstate judges are good judges. Such a proposition may be open to some challenge on the facts. Moreover, it is difficult to see how a court system can be operated efficiently for a whole state, if most of the judges are to be left to popular selection. Even in downstate Illinois, it appears that each party central committee usually picks its judicial candidate in advance of the judicial convention, so as to place each bar association under the awkward necessity of singling out one candidate for disapproval and thus a bar poll is not so effective as it might otherwise be. Also, if direct popular election of judges works badly in the largest communities where it is tested most, that fact would support the American Bar Association postulate that it is a bad method in principle everywhere.

The Illinois proposal requires that each commission comprise an equal number of lawyers and of non-lawyers, leaving the possibility, but not the probability, of deadlock. The Missouri Article provides for an equal number of members of the integrated Missouri Bar and an equal number of laymen plus the Chief Justice, as to the Appellate Judicial Commission, or plus the presiding judge of the District Court of Appeals in the Circuit Judicial Commission. Perhaps, a Chief Justice has enough power in running a state's court system without conferring upon him the further responsibility of a crucial vote in the selection of its personnel. Also, it must be remembered that the Governor names the Chief Justice and the Governor may also be empowered to designate the lay members of the Commission, thereby, directly or indirectly, giving the Governor the power of appointing the majority of the members of the Commission which could result in giving a Governor some control of the majority vote in the Commission so as to outvote the bar members. This difference in the two articles does not appear to be of vital importance.

The fact that Missouri has an integrated bar of which each lawyer must be a member, while Illinois has only voluntary bars, may provide a problem in the exercise of the delegated rule-making power. The solution is more complicated than the Illinois Supreme Court's present delegation of recommendatory disciplinary powers by rule to the Chicago and Illinois State Bar Associations' governing bodies. It may result in a difficult administrative task if these two bar associations are compelled to poll members and non-members alike. The problem could possibly be handled through the Court's designation of the bar journals as legal periodicals of general circulation and as the sole notice instrumentality of the time and manner of partici-

[13] Hyde, *The Missouri Plan for Selection and Tenure of Judges*, 39 J. CRIM. L. AND CRIMINOLOGY 277 (1948).

pating in the bar election of its Commission's members. No complete official list of all the lawyers in Illinois now alive and in practice, with addresses, is known to exist, although the Illinois State Bar has a good list. Another possible device might be the entering of a court rule for each election of bar members. This would seem an adequate notice of the election in each case.

The fact that the Illinois proposal does not designate the number comprising each Commission seems unimportant, although the legislature could conceivably prescribe a large and awkward number as a means of conferring honors. So much confidence is already reposed in the legislature that it is to be presumed a completely responsible body for this or any other purpose.

Although the terms of the Missouri and Illinois Supreme and Appellate Court judges (twelve years) would be the same in fact, under both articles, the Illinois article specifies that particular term for them as well as a term of eight years for all other judges, while Missouri trial judges have terms of only six years. Nevertheless, it appears that security of tenure is an important part of the plan and that it should be imbedded in these particular sections of the proposal just as it is. The best lawyers will be more strongly attracted to give up completely their personal practices to their colleagues and competitors in going on the bench, if they are assured a reasonably long tenure. In principle, the term should probably be for life or good behavior, but it is doubtful if the electorate is yet ready for that step, while these longer terms are probably now acceptable to the public. The staggered terms in Missouri seem preferable.

Similarly, these sections of the Missouri Constitution are silent as to the term and manner of appointment of the Chief Justice, as the chief operating officer of the judicial system. It is submitted that these matters should be specified and placed where they are in the Illinois proposal as an integral part of the plan. The change to a six-year term for the Chief Justice, as opposed to the present annual rotation of the Court members is necessitated, first, because such a Chief Justice will be the administrative head of the judicial system and will require a year of experience to become fully effective, second, because not every judge has administrative talent and, third, because the annual rotation was itself only explainable on the Jacksonian assumption that, if all men are equal, all lawyers are equal and all judges are equal, wherefore, any one of the justices should be as much entitled to be Chief Justice as any other.

Apparently, under the Missouri Article, as well as under the Illinois proposal, apart from death, resignation, removal or retirement, there is no judicial vacancy until a judge is rejected on the question of whether he should be retained or until he fails to file a declaration of candidacy to succeed himself *and* his term shall have expired on the last day of the December following. Also, the Governor's power to appoint does not ripen

until the vacancy occurs on that date. The Governor could conceivably fail to appoint for ninety days after the Commission has nominated. While this opens the door to extended judicial vacancies, the difficulty is decreased by the power of the Chief Justice to assign and retire judges, unless the vacancy should be in the office of the Chief Justice himself. A long continued vacancy in that office could be most disruptive to the entire system, since the administrative director and his staff are only agents of the Chief Justice. A governor could decline to appoint either of the two nominees of the Supreme Court nominating Commission, resulting in a deadlock, until one of the Governor's own preferences should be nominated. It is not perfectly clear that the Section 11 provision, for appointment of judges by the Supreme Court upon the Governor's ninety-day failure to appoint, applies to the appointment of the Chief Justice, even in the light of Section 5 which provides, in part, that, "The Supreme Court shall consist of seven judges, one of whom shall be the Chief Justice . . ." This should not be left to construction because the only fact situation that would give rise to such a controversy would be a dispute between the two branches of government.

The provision for appointment by the Supreme Court, when the Governor fails for ninety days to appoint from the panel of nominees, does not appear in the Missouri Article. In twelve years the problem appears not to have arisen in Missouri. The thought may be that the Missouri Governor is open to mandamus, if he fails to perform his constitutional duty; but, in Illinois, mandamus does not lie unless the right claimed is clear and certain, while any action by the Governor, in this respect, would be the result of his choice, being a discretionary act. Moreover, a mandamus action is subject again to the same crucial objection against any possibility of a dispute between two branches of the government to be determined by the judicial arm which is physically, at least, the weakest. Consequently, this provision of the Illinois proposal appears not only ingenious, but very desirable. It seems likely that the Supreme Court could act in such a matter with the participation of less than seven judges, since countless cases are decided by participation of less than the full court. It would appear that a quorum could act to make an appointment to the Supreme Court, on default of the Governor's action for ninety days.

The Missouri Article provides for panels of three nominees, while that proposed for Illinois provides by Section 11 that, "the number of nominees for each office shall be fixed by law, but shall be not less than two nor more than five." Again, this is properly left to the legislature. It is presumed that the two Bar Associations are undertaking responsibility for preparing and presenting drafts of statutes and Supreme Court rules to implement appropriately their proposed constitutional article, if adopted.

Missouri specifies the wording to go on the ballot. The Illinois proposal does not. As a method of reducing the possibility of litigation, the Missouri

specification of the ballot question has some merit. However, the drafting intent is reasonably clear since the A.B.A. Plan and the Missouri Article were obviously the drafting models and since each of them specifies the same ballot words in the form of a direct question rather than the indirect form appearing in the Illinois article.

The Missouri Article makes any person holding public office (excluding the Commission Chairman who is *ex officio* the Chief Justice or presiding appellate judge), or holding an official party political position, ineligible as a Commission member. The proposed Illinois article makes ineligible only those persons holding official positions in a political party. It is difficult to perceive any good reason for this divergence. The moving purpose of the plan is to minimize political influence in the selection of judges. This object is surely not furthered by qualifying politically elected public office holders to sit on judges' nominating commissions. At least, there are still enough citizens capable for the purpose who do not hold public office. This eligibility provision, permitting public office holders to qualify, seems to violate the language and the spirit of the plan. Here the purpose of the drafting committee is not discernible. Yet, there is so much that is good in the draft and so little that is bad, and the whole is so much better in every way than the present system, that we need not boggle at this defect.

Section 19 of the Illinois proposal should be insisted upon. Without it, the bench may too easily be brought into public disrepute and the judges may not be taken out of politics. It is recognized that the relatively low judicial salaries which are unrealistic in view of the rising cost of living, have led downstate circuit and county judges to augment the Cook County bench, for extra pay, and have caused some county judges to practice law, to take retainers, and even to hold part-time jobs. Moreover, all Illinois judges have been in the position of needing to make political contributions to stay in office. It is no violent assumption that the Bar will be militant and vigilant in pressing for reasonable judicial compensation. This is one aspect of the state finances which is very much the business of the Bar. Consequently, new non-political judges under the proposal, as well as all judges now in office who are retained, should have no apprehensions, but rather should have reassurance, for their future economic welfare, if this proposal is enacted. Likewise, nothing could be clearer than that the judges' salaries and expenses should properly be paid entirely by the state, since they will be officers of the state judicial system, and not county officers, and may serve where they are needed. They should not be obliged to look to local elective officials for their compensation or expenses, in any part. Also, it is perfectly understandable that it should be open to the legislature to enable Cook County to compensate its very large number and different classes of judges additionally and differently.

The Illinois retirement, suspension, and removal provisions seem to be the kingbolt of the entire plan. This proposal would not supersede the

impeachment proceeding by the legislature, but is a remedy additional to that virtually unused and unusable proceeding to remove a judge for cause. Far more crucial, however, is the fact that a Chief Justice could not effectively administer a single state judicial system unless there existed, in some form, the power of enforcement of the supreme court's assignments and of making reasonable requirements of the appellate and circuit judges.

The time of discontinuance of all courts of limited jurisdiction, dispensing with the county, probate, city, and township judges and with the unpopular, ineffectual, and obsolete justices of the peace as magistrates, will be a glad day indeed for all Illinois citizens who come before the courts. This applies to lawyers and litigants alike, as well as to the judges whose uncertainties of jurisdiction, as well as of tenure, should be resolved. All these have suffered the endless frustrations, uncertainties, lost causes, and needless waste of time, money, and manpower inherent in a system that too often lets no man surely know whether his case or his appeal is in the right court. A simple matter like this need never even once have been left open to the slightest doubt, yet lawyers and litigants have been forced to struggle up and down this hazardous, broken ladder of ancient and outworn courts endlessly until the wonder is that the public and profession have endured it at all, much less that they should have had to bear with it.

CONCLUSION

Objectively, one would surely prefer to start the new court system from scratch without retaining any vestige of a disorganized system that should be scrapped as soon as possible. The retention of the present justices and judges is undoubtedly an inescapable expedient in view of practical economic and political realities and, as such, should be acceptable to the proponents of the proposal. Abolishing the judicial functions of the township justices of the peace is so long overdue that it would seem that every citizen, except a direct beneficiary of that atavistic and indefensible parody of a once noble institution—now become an engine of injustice and indignity—must be delighted to help consign it to history.

In a word, if there be flaws in this proposal, as there must be in every human document, they are freely waived as not appearing to be of a fatal character.

It cannot much longer be a question of what is or would be convenient or profitable to the bench, the bar, the party organizations, or particular groups which benefit by things as they are. The ordinary voter may not know precisely what justice is nor what it means, but he does know that it has not been forthcoming either as efficiently or as expeditiously as it should be if it is to be judged a success.

More than that, if the administration of justice, as we have known it, is to be preserved, with an independent bench and bar, our judges must,

every one of them, be more above reproach, justified or unjustified, than Caesar's wife. The continued newspaper publicity, critical and adverse, toward many Chicago judges, is symptomatic. Some part of that publicity—true or false, fair or unfair—is believed by some and makes other men disbelievers in the things that judges, lawyers and all good citizens must believe in and foster with all their hearts.

We can and ought to restore the judges to the respect and affection of the public by uniting in active support of the judicial article in every effective way that we can find in an all-out and unceasing effort to present a more creditable picture of judges, law, and lawyers to the mirror of public opinion—and to ourselves.

Our way of justice and our judges should and can be more respected and loved in Illinois than they are.

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