Tulsa Law Review

Volume 2 | Number 2

1965

Selection of Judges in Oklahoma

Jack N. Hays

SELECTION OF JUDGES IN OKLAHOMA

Jack N. Hays*

Oklahoma is one of the dwindling number of states in which judges are elected by partisan political election. For some years many thoughtful citizens of the state have questioned whether this was the best possible way to choose the personnel of the judiciary. Recent charges of corruption, particularly the conviction of a former member of the Supreme Court of Oklahoma (a supernumerary judge at the time of his sentence) on income tax evasion with statements made in open court that money was paid to him to influence decisions, have caused many more persons to become intensely interested in Oklahoma's judicial system. It is timely, therefore, to inquire whether some better method of selecting judges might be adopted.

As we have indicated, interest in improving the selection of judges antedates the current investigations and proceedings relating to misconduct of judges. The Oklahoma Bar Association for many years has advocated a change. Under its sponsorship together with the American Judicature Society and others approximately 100 lawyers and laymen met in a conference at Norman, Oklahoma, for three days in December 1962. From the intensive discussions at that meeting came a consensus which can well serve as the text for this article. Among other things the conferees said:

> It is indispensable to the proper functioning of the judicial system that men who are to be judges be selected solely on the basis of their qualifications for judicial office rather than on their ability to campaign and to obtain partisan support.
>
> The objective of any method of selection should be to obtain judges free of political bias and collateral influence and possessed of qualities that will lead to the highest performance of their judicial duties.[1]

The political election of judges has been regarded by some as sacrosanct. Many argue that the privilege of voting for judges in a free-for-all partisan political contest is a basic constitutional right of some sort. It will be said by the opponents of any reform plan that an effort is being made to take away the liberties of the people.

There is no historical or constitutional foundation for the popular election of judges. Our federal system was appointive from the start and so were the selection methods of the thirteen original states. The idea of popular election of judges was a product of the Jackson era along with

*B.A. 1938, University of Tulsa; J.D. 1942, George Washington University; Order of Coif; American College of Trial Lawyers; member Tulsa County (Pres., 1958), Oklahoma (Vice Pres., 1959; Pres., 1962), and American Bar Association.

[1] 46 J. AM. JUD. SOC'Y 150, 151 (1962).

the long ballot and short terms generally. Today only sixteen states of the fifty have partisan election as the principal method of selecting judges.[2]

Two of our leading authorities have said:

> The great men who founded our nation and wrote the Constitution wrought well, and their ideas have earned our respectful consideration. If they were to come back today they would find many surprises, but none more than the elective judiciary. They never thought of such a thing. They provided in the federal and the first state constitutions for appointment by the governor subject to some kind of check or control by a council or a legislative body. It was not until three quarters of a century after our nation was founded, in the era of so-called "Jacksonian democracy," that the vogue of popular election for short terms swept into the judiciary, following New York's lead in 1846. Within 20 years a reaction set in and there has been dissatisfaction and debate ever since.[3]

One of the greatest weaknesses of the popular election is that the voters do not know the judges for whom they vote. This may not be true of trial judges in the rural and small city district but in metropolitan areas and in the selection of appellate judges generally, the voters' ignorance in judicial races is matched only by their apathy.

A study of the interest of voters in judicial elections was made by the Elmo Roper organization in New York State *within 10 days* after the general election on November 2, 1954. Those who had voted made the following significant replies:

Of those who had voted at all, the percentage that—	New York	Buffalo	Cayuga County
—had voted for any judicial candidates was	75%	88%	80%
—paid attention to judicial candidates before the election	39%	52%	25%
—could name one or more judicial candidates voted for	19%	30%	4%

> Those who had paid attention to judicial candidates before the election were asked what they had done to help them decide which judges to vote for. About half of those in New York (18 out of 39 per cent) and a third of those in Buffalo (15 out of 52 percent) and Cayuga County (9 out of 25 per cent) admitted that the "attention" they had given the matter was to take the party's word for it and vote a straight ticket. A smattering of others said they had consulted friends, both lawyers and non-lawyer's, or had followed a newspaper's or a bar or lawyer's association's recommendation.[4]

I know of no such scientific survey in Oklahoma, but I am certain that voters in this state would fare no better, or at least not until recent sensational news stories have publicized a few names on the Oklahoma

[2] Am. Jud. Soc'y Information Sheet (Nov. 20, 1962).
[3] Winters and Allard, *Two Dozen Misconceptions About Judicial Selection and Tenure,* 48 J. AM. JUD. SOC'Y 138, 139 (1964).
[4] 38 J. AM. JUD. SOC'Y 141 (1955).

Supreme Court.

There should be no partisan political issues in a judicial race. Do we have Democratic Justice or Republican Justice? Can a judge or prospective judge pledge himself in advance as to decisions? Merely to state the questions is sufficient. Judges have no political issues upon which to campaign. Impartial administration of justice should be the criterion and how does that square with partisan politics! For those who say we have only to make the elections non-partisan we shall have more to say later.

To support the partisan election system one must necessarily make the assumption that the best politician will make the best judge. While a good judge may have attributes which would aid him in political life this is not an essential qualification for the judiciary. By making it a qualification in our elective system we eliminate entirely many good, quiet, scholarly men who would be able judges but would not under any circumstances subject themselves to an Oklahoma political free-for-all contest. This type of man, who perhaps would make the very best judge, is completely eliminated under the present system. The loss to judicial service of qualified but non-politician type lawyers is a severe handicap in the recruitment of able judges.

There are evils in the selection of judges by political campaign which Oklahomans are just beginning to realize. Campaigns are expensive and are becoming more so. Thousands of dollars are necessary for almost any kind of campaign. Where does the money come from? Few judges have the personal funds with which to pay expenses and even if they had, a man who is willing to devote himself to judicial service should not have to buy the office.

On the other hand the receipt of campaign funds from lawyers and prospective litigants is obviously bad. At best it places the judge and the lawyers who have contributed to his campaign in an embarassing position. At worst the campaign fund "contribution" can be the cover for the real pay-off in a corrupt situation. Until our judges are removed from the necessity of engaging in political campaigns the evils of the campaign fund will remain (and this is true whether the election is partisan or non-partisan). This evil is contrasted with Missouri where the usual campaign expenditure for an appellate judge is the five cent stamp on the envelope in which he mails his notice of intention to serve another term.

Another evil of the political campaign is the tremendous waste of judicial man hours in such campaigns. Every working hour spent in campaigning is lost to judicial service. In addition judges who must run for office must also, of necessity, devote many hours and days in the type of personal contact work "back home" which will be most likely to insure their re-election. Perhaps this may explain in part recent testimony before a legislative committee by the former legal assistant of an Oklahoma judge who asserted that he as legal assistant had actually made the decisions in all but 12 or 15 of the several hundred cases before the court in his tenure.

Although no such rule is evident in Oklahoma the Chief Justice of the Supreme Court of Texas has stated that his court actually excused a judge from sitting during a six month period so that he could campaign without interference.

The political election of judges has an inevitable effect on the security of tenure of judges. A good judge may be removed from office by a change in party dominance and a poorly qualified judge may be swept into office on the tide of a party victory. Chief Justice Harry L. S. Halley of Oklahoma rather dramatically illustrates this possibility in his own career. In 1946 he was defeated for reelection as a District Judge in the Judicial District including Tulsa County in a Republican sweep following World War II. In that election every sitting Democrat judge in Tulsa was defeated by his Republican opponent. Just two years later Justice Halley was elected to the Supreme Court of Oklahoma. No one can possibly justify this on the basis of voter intelligence. Justice Halley jokingly says in 1946 he was such a poor judge the voters retired him and in 1948 he was such a good judge the voters put him on the Supreme Court. He improved a lot in two years off the bench! He is one of the strongest advocates of a change in the method of selecting judges in Oklahoma.[5]

The full effect of the insecurity of tenure under our present system has not been fully felt in Oklahoma. Until recent years Oklahoma has largely been a one-party state. Henry Bellmon, Oklahoma's first Republican governor, says he hopes to have Republican candidates for all Supreme Court posts in future years.[6] We can therefore expect more insecurity and more politics in the future, not less. This cannot improve our system. More and more of our judges will be elected on the political whims of the populace rather than ability and other judicial qualifications.

Under the political elective system there is no review of qualifications of judges prior to election. The only requirement is that they must be members of the bar. Ability and experience are not reviewed by any one and the voters can scarcely be expected to know about such professional matters.

Another by-product of the partisan political election is that judicial decisions in the public area are more likely to be politically influenced. A specific example of apparent political influence appears in recent decisions of the Oklahoma Supreme Court on reapportionment. For example in the case of *Jones v. Winters*,[7] the two justices from the metropolitan districts voted to exercise judicial power against unconstitutional legislative apportionment while the rest of the court from out-state areas with one exception voted against such action. Surely it was no coincidence that the judges happened to decide the case in accordance with the well known views of the voters in their respective districts.

A little-noticed feature of Oklahoma's present method of selection

[5] Testimony before House Judiciary Committee of the Oklahoma Legislature (March 17, 1965).

[6] Tulsa Tribune, March 3, 1965.

[7] 369 P2d 135 (Okla. 1961)

is that many judges go on the bench initially by appointment of the governor. Studies reflect that perhaps as many as 50% of the trial judges undertake judicial office in that manner. In Oklahoma the governor has unlimited power of appointment in the filling of vacancies on the Supreme Court and District Court level. In effect this is one man judicial selection. No confirmation or review of such appointments whatever is required by law.

In 1962 the Oklahoma Bar Association obtained commitments from gubernatorial candidates to a voluntary plan of submitting prospective judicial appointments to a committee of the Bar Association for the purpose of screening candidates for appointment as to qualification.[8] The present administration has followed this plan faithfully. It is however wholly voluntary and could be repudiated by any governor at any time. Some further legal assurance of qualified appointments is badly needed for the future.

What are the alternatives to the selection of judges by partisan political election? The principal ones are (1) non-partisan election, (2) appointment with or without confirmation or review and (3) appointment from names selected by a nominating commission with periodic non-competitive election.

In this writer's opinion the first of these alternatives, namely the non-partisan election, is the least desirable of all, including the present partisan election system. An editorial in the American Judicature Society Journal of December 1964 referring to the non-partisan election system said:

> In nonpartisan politics, the danger is not the power of political bossism. The basic danger in nonpartisan politics is the *dictatorship of irrelevancy.* Having the same name as a well-known public figure, a large campaign fund, a pleasing TV image, or the proper place on the ballot are far more influential in selecting judges than character, legal ability, judicial temperament or distinguished experience on the bench.
>
> In 1962, a supreme court jurist with a solid record of 14 years of service was up for re-election in a nonpartisan elective state. His opponent, a lawyer with no judicial experience, did not make an active campaign. He offered the voters chiefly his name—*Robert Kennedy*—he almost won.
>
> Recognition of this dictatorship of irrelevancy is leading more and more thoughtful citizens of nonpartisan states to seek a more suitable method of selecting their judges. In 1962, the voters of Nebraska, a nonpartisan judicial selection state, resoundingly rejected nonpartisan judicial elections and adopted the Society's merit selection and tenure plan for all the judges of that state. In Ohio, another nonpartisan elective state, civic groups have joined the bar in calling for a change. The same is true of North Dakota, another nonpartisan elective state. There are groups and individuals in every nonpartisan elective state who are now at work to replace this dictatorship of

[8] 33 O.B.J. 951 (1962).

irrelevancy with a judicial selection and tenure method based on character, ability and experience.

The merit plan is not only the answer to the shortcomings of partisan political selection of judges. It is also the best answer to the dictatorship of irrelevancy which today arbitrarily rules the bench in nonpartisan elective states.[9]

The true appointive system is more likely to produce good judges than the partisan election. It is however subject to abuse. If the appointive authority chooses to make the appointment on a purely political basis he may do so. No one can say that the usual appointment to the Federal judiciary is not highly political. Presidents have appointed few members of the opposition party to judicial posts and then perhaps only where there was no Senator of the President's own party to whom obligation was due.

Lifetime tenure in the judiciary carries another risk—that of judicial tyranny. Some human beings unfortunately do not wield power gracefully. Lawyers can tell tales of unjustified treatment at the hands of men who are on the bench for life. This is perhaps the greatest barrier in a state like Oklahoma to the adoption of a merit system for the selection of judges. In any event it is a factor to be reckoned with.

What would appear to be most desirable is a plan which would combine the best features of both appointment and election with a minimum of politics and a maximum consideration of merit.

Again turning to the consensus adopted at the Conference in Modern Courts for Oklahoma held in Norman, Oklahoma in December 1962, we find the following:

The method of judicial selection and tenure proposed by the Oklahoma Bar Association and currently before the Oklahoma Legislature is approved in principle as meeting these desirable and necessary objectives. Particulars and specific details of this proposed method should be left for later determination as practicality and necessity dictate. Any such plan, however, should provide for a nonpartisan nominating commission composed of lawyers, judges, and laymen and should leave with the people the ultimate decision in a noncompetitive election whether a judge should be retained in office.[10]

The Oklahoma Bar Association Plan for judicial selection and tenure was first approved by the House of Delegates of the Association in July 1962, and was subsequently reaffirmed in July 1964.[11]

Briefly summarized the Oklahoma Plan provides for a nominating commission to function in the filling of vacancies in positions on the Supreme Court of Oklahoma and on the Court of Criminal Appeals, those being the courts of highest resort in the Oklahoma system. The commission would be composed of 13 members, 6 laymen elected on a non-partisan basis from the 6 congressional districts, and 6 lawyers

[9] 48 J. AM. JUD. SOC'Y 124, 125 (1964).
[10] 46 J. AM. JUD. SOC'Y, op. cit. supra note 1.
[11] The full text of the proposal may be found in Vol. 35 O.B.J. 1300 (June 30, 1962); and Vol. 35 O.B.J. 1185 (June 27, 1964).

elected by ballot of the members of the bar in each of the 6 congressional districts. The 13th member would be a lawyer elected by the state's lawyers at large. Members of the commission serve 6 years with staggered terms.

In the event of a vacancy this group would, after reviewing the qualifications of prospective nominees, present three names to the governor who would be required to appoint one of the three. If the governor did not act after 60 days, the Chief Justice of the Supreme Court would make the appointment.

The judge so appointed would serve one year and thereafter until the first Monday in January following the next general election. In the next general election after his first year his name would go on the ballot for approval by the voters in non-competitive election. The form of the ballot would be:

> Shall _____, judge of _____ court be retained in office?
>
> ☐ yes ☐ no.

If retained in the initial election then the judge would serve a full term with another non-competitive election at the end of such term and thereafter for successive terms so long as the voters approved his retention.

If a vacancy occurred either by death, retirement, removal or defeat at the polls, the vacancy would be filled through the appointive process described above.

The Oklahoma Plan also provides for extension of the plan to trial courts of record by local option. It would apply only to such districts in which the voters approved it. In such event the county or district nominating commission would be composed of 4 lawyers and 3 laymen.

While this plan is sometimes referred to as the Missouri Plan because of the existence of a somewhat similar plan in Missouri for 25 years, there are some differences. The nominating commission for appellate courts in Missouri is composed of 3 laymen, 3 lawyers and the Chief Justice of the State Supreme Court. The laymen are appointed by the governor and the lawyers are elected by lawyers in the appeals districts. The system, however, is similar in principle. Trial courts in Jackson County and in the City of St. Louis are also covered.

Every new proposal faces questions of feasibility. There is by now, however, a great deal of background and experience in the merit appointive-elective system on which the Oklahoma Plan is based.

Early in this century legal scholars began to work on ways of improving the judiciary. Roscoe Pound in his famous speech in 1906 on the "Causes of the Popular Dissatisfaction with the Administration of Justice" decried the political selection of judges in the following language:

> Putting Courts into politics and compelling judges to become politicans in many jurisdictions has almost destroyed the traditional respect for the bench.[12]

In 1913 the American Judicature Society first advocated the

[12] 29 A. B. A. Rep. 395, 415 (1906).

appointive-elective system which was devised by Professor Albert M. Kales of Northwestern University. In 1936 the American Bar Association endorsed the plan and it has had the support of that association since that time. The Model Judicial Article sponsored by the Section of Judicial Administration of the American Bar Association contains a selection and tenure plan of this type.

Interestingly enough the movement to adopt this merit plan has been primarily midwestern in origin and development. Originally devised by a professor in Illinois and first adopted in Missouri it has since been adopted with local modifications in Kansas (1958) (for its Supreme Court), Nebraska (1962), Iowa (1962) and Alaska (1956). The retention features of the plan have also been adopted in Illinois (1962).

It really appears that Missouri must have something when you look at the states surrounding it. Kansas to the West, Nebraska to the Northwest, Iowa to the North and Illinois to the East have all adopted all or part of the "Missouri Plan." In fact, Iowa and Nebraska have gone even farther and have applied the plan to all courts, both trial and appellate. It is also significant that Nebraska went to the Merit Plan from a nonpartisan election system.

No state having once adopted a Merit Plan like that in Missouri has ever repealed it. The movement is all in one direction with current drives for merit system adoption in Arkansas, Colorado, Florida, Illinois, Indiana, Kansas (trial courts), Louisiana, Maryland, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Dakota, Texas and Wyoming, as well as in Oklahoma.

Since Missouri has had far more experience, we look to it for the most reliable results. A Missouri judge, appointed under the system as a young man out of a general practice law firm sizes it up this way:

> Our lawyers and citizens have seen first hand how a system of merit selection of judges results not only in attracting to the bench those who are best qualified, but also assures security of tenure and the preservation of the experienced services of those who ably serve the administration of justice.
>
> After more than a dozen years of experience, I personally know we have a truly independent judiciary in Missouri. Our litigants are receiving a higher quality of justice and our people have a growing confidence in our courts. Excellent lawyers now agree to serve on our bench who would not submit themselves to the ordeals of the old political system. We have been successful in attracting to the bench some very outstanding and able young men who desired to make the judiciary their career and whose vigor and energy are needed for, contrary to popular conception, judicial work and particularly trial court work is physically demanding. The courts have been completely freed in every respect from party politics.
>
> Today our judges devote their time to their courts and its business, free of political pressures or loss of time. The administration of justice has been speeded up. This merit plan, admittedly not perfect, admittedly not a panacea for every judicial problem, has fully demonstrated to the citizens of Missouri that it is the best

yet devised and that it is a tremendous improvement over the old system of partisan political election.[13]

Some suggestions have been made from various quarters for modifications of the Oklahoma Plan. Some members of the League of Women Voters in Oklahoma have advanced the thought that a majority of the nominating commission should be laymen. There may be some merit in this, especially with both the courts and the profession under severe public attack. In New Mexico a current proposal calls for a nominating commission of 5 laymen and 2 laywers. Such a plan might avoid the criticism that the Merit Plan is just a lawyers plan and might also point up the obvious fact that the courts really belong to the people and not to either the politicans or the lawyers.

Another suggestion which may have great merit is that the nominating commission itself review the performance of judges from time to time. Judge Samuel I. Rosenman who has served in the judiciary and in many other public capacities has suggested in lieu of the non-competitive election that after a substantial probationary period the "judge be carefully reappraised on his performance by the nominating commission itself."[14] Others have thought that the non-competitive election should be used but with the Commission meeting for the purpose of advising the voters prior to such election.

The trend of this century is toward the merit selection of judges. When Oklahoma adopts such a plan it will have taken a large step forward. Such a plan of selection, together with proper provisions for the discipline and removal and decent retirement can give us a judicial system in this State of which we may all be proud.

[13] Hunter, *A Missouri Judge Views Judicial Selection and Tenure*, 48 J. AM. JUD. SOC'Y 126, 132 (1964).

[14] Rosenman, *A Better Way to Select Judges*, 48 J. AM. JUD. SOC'Y 86, 90 (1964).