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Some Thoughts for Judicial Reform in Oklahoma

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SOME THOUGHTS FOR JUDICIAL REFORM IN OKLAHOMA

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Dissatisfaction with the administration of justice is as old as law. Not to go outside our own legal system, discontent has an ancient and unbroken pedigree.

Pound, 1906

In the latter half of the decade of the 1960s, the people of Oklahoma endorsed proposals of their Legislature and thereby accomplished significant and needed reforms in the judicial department of the state. On May 3, 1966, article VII-A was added to the Oklahoma Constitution —a Court on the Judiciary was thus created and invested with power over the tenure of Oklahoma judges. Two additional judicial articles were adopted on July 11, 1967. Article VII-B provided that justices of the supreme court and judges of the court of criminal appeals shall be appointed by the Governor from nominees submitted by a Judicial Nominating Commission and that their retention in office shall be determined only on the basis of their records. More significant, however, was the adoption of a new article VII, which created a single trial court of general jurisdiction and a unified court system under the supervision and control of the supreme court. The accomplishments of this reform era have elsewhere been well chronicled by others and will not be repeated here.

The purpose of this essay is to question the system where shortcomings are known to exist and to propose alternatives or changes not only to resolve problems now faced but at the same time better to equip the judicial department for meeting probable future needs.

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This article was completed prior to the 1974 session of the Oklahoma Legislature —Ed.

Apparently, the pedigree of discontent of which Dean Pound spoke is yet unbroken. In his 1973 report to the Legislature, the Chief Justice identified four areas in which reform critically is needed: judicial manpower, defense services, judicial salaries and appellate court dockets.[1] Discussion may thus begin with these four topics.

Defense Services

Since 1963, decisions of the Supreme Court of the United States have increasingly required the states to provide defense services to indigents who face possible confinement. Even today those services are rendered by court-appointed counsel in all but the three Oklahoma counties in which public defender systems have been established. Chief Justice Davison has proposed two reform measures. One is to eliminate the possibility of confinement for minor offenses where it seldom has been imposed and seems unnecessary for effective enforcement. In suggesting the second needed reform—creation of a statewide defense service independent of the judiciary—the Chief Justice has forcefully pointed out the principal reason for it: "Judicial operation of defense services is totally incompatible with the judge's traditionally neutral position. There is as little basis for a judge to control the choice and compensation of defense counsel as there is for him to control public prosecution."[2] Such a system may tend incidentally to ease another problem, docket congestion in the court of criminal appeals, by reducing the frequency of constitutional and other error creeping into criminal trials. The matter merits high legislative priority.

Judicial Manpower

According to the Chief Justice, the judicial manpower problem primarily results from "serious geographical maldistribution in Oklahoma judgeships."[3]

In most respects, Oklahoma's new judicial article was "written in broad strokes, with quill pens and little ink."[4] Unfortunately, but no doubt a legislative compromise necessity, it requires that "[t]here shall

1. *Report by Chief Justice Denver N. Davison to the Oklahoma Legislature* in 44 OKLA. B. ASS'N J. 529 (1973) [hereinafter cited as *Report*].

2. *Report* at 530.

3. *Id.*

4. The quoted language is that of Judge Shirley Hufstedler, of the United States Court of Appeals for the Ninth Circuit. Hufstedler, *Constitutional Revision and Appellate Court Decongestants,* 44 WASH. L. REV. 577, 579 (1969).

be at least one Associate District Judge for each County in the State."[5] Although the supreme court has the power to assign any trial judge to sit anywhere in the state,[6] the exercise of that power as a practical matter may be limited. Certainly the supreme court is not obligated to, nor should it, geographically redistribute the judiciary by wholesale "permanent" assignments. The court should nonetheless continue temporarily to assign judges as may be necessary and, in spite of "growing resistance" to assignments noted by the court,[7] it should fully utilize available judicial manpower, at least within a judicial district.

Several reasons can be advanced for repeal of the one-associate-district-judge-per-county requirement. There is the already noted waste of available judicial manpower. The provision denies the Legislature and the court needed flexibility in dealing with docket realities. In counties where the lawyer population is small, the people often have little choice, if any at all, in the selection of an associate district judge; in other counties a large pool of talent is left relatively untapped. Finally the provision reduces the Legislature's ability to make uniform statewide and to raise qualifications for the office.

Legislative efforts to repeal the one-associate-district-judge-per-county provision should continue. Should those efforts fail, the people should take the initiative. Moreover if the provision be repealed, the office of associate district judge should itself be eliminated. The constitution makes little distinction in qualifications for the office of district judge and that of associate district judge. Whereas the former must have a minimum of four years' experience in Oklahoma as a licensed practicing attorney or court-of-record judge, the latter need be only an attorney licensed to practice in the state. The Legislature may, however, make uniform the qualifications for both offices.[8] No sound reason can be advanced to support the need for "black-robed" and "gray-robed" judges. Although Oklahoma's courts have not so far degenerated into a dual system of trial courts, a system which article VII explicitly abolished, that possibility nonetheless exists.[9]

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5. OKLA. CONST. art. VII, § 8(d).
6. *Id.* § 8(i).
7. *Report* at 529.
8. OKLA. CONST. art. VII, § 8(g).
9. *See id.* § 8(d). Judge Hufstedler has said that a dual system of trial courts is sometimes supported by the "sticks" theory—"neither the size of the problems nor the size of the population requires the services of a big court or even a big judge. The urban variation . . . preserves the small problems rationale." Hufstedler, *supra* note 4, at 580-81.

"No one can quarrel with the ideas that sparsely populated areas need ready access to courts and that the quantity of work in rural areas does not necessarily warrant a live-in, full-time judge."[10] The need for additional judges in heavily populated urban areas must be met, and at the same time the availability to rural populations of courts of high quality should steadfastly be maintained.

> Why cannot a single judge of a single trial court ride circuit through the rural areas to handle the caseloads, assisted by commissioners or referees [or special district judges] attached to the same court, who can take care of chamber business and likewise serve as judges or magistrates pro tempore to handle routine civil matters and to adjudicate minor criminal offenses?[11]

Judicial Salaries

It cannot be denied that in Oklahoma judicial compensation is woefully inadequate. Some may call it stingy. In 1972, with salaries of trial judges ranging from $13,500 to $20,500, when the national average was $26,265 and the median $25,000, Oklahoma ranked below all other states and the District of Columbia. In the same year the compensation of members of the two highest appellate courts, at $25,000, placed Oklahoma in a four-way tie in thirty-eighth place and well below the national average of $31,115 and the median, $30,000.[12] Neither the increases effective in July, 1973, nor approved for July, 1974, appear sufficient to raise significantly Oklahoma's low ranking.[13]

Oklahoma is indeed fortunate to have so many excellent judges, most of whom are serving at considerable financial sacrifice. Increasing compensation to a realistic level would tend not only to increase the number of lawyers who might be willing to assume the bench but to reduce the number of judges leaving the bench primarily for financial reasons, a problem which Chief Justice Davison laid squarely in the lap of the Legislature: "Recent resignations from the state judicial service of many able men are not so much attributable to the lure

10. Hufstedler, *supra* note 4, at 581.
11. *Id.* (footnote omitted). See OKLA. STAT. tit. 20, § 123 (Supp. 1973).
12. *Report* at 534-35.
13. On July 1, 1974, compensation for trial judges will range from $14,885 to $22,170; members of the two highest courts will receive $27,040. OKLA. STAT. tit. 74, § 285 (Supp. 1973). Low compensation is not confined to judges but permeates the judicial department; moreover some disparities exist. For example, legal assistants and law referees of the supreme court and referees of the court of criminal appeals may currently be paid a maximum of $16,750, whereas law clerks of the court of appeals are limited to $7,250. *Id.*

of the private sector and the federal civil service as to the general lack of faith in [the Legislature's] willingness to improve judicial compensation."[14] Unfortunately, the remarks fell on deaf ears.[15] There can be little doubt that inadequate compensation is a serious impediment to the maintenance of high standards in the judiciary.

Appellate Court Dockets

A backlog of cases in appellate courts is a perennial problem. Oklahoma's backlog primarily is in cases in the court of criminal appeals and, in the supreme court, "an ever increasing number of petitions to review by certiorari the decisions of the intermediate courts."[16] Not so clear is whether the supreme court's backlog also consists of cases where the record is yet incomplete and of cases it chooses not to assign. There is no backlog in the court of appeals; cases assigned to it are finally decided within a few weeks after completed records are received. Oklahoma's backlog thus presents two distinct problems for which different solutions are required.

1. Congestion in the Court of Criminal Appeals.

The appellate backlog in criminal cases results primarily from the facts that only the court of criminal appeals has jurisdiction of such cases and that there are just too many of them for the three members of that court to handle. It has been proposed in the Legislature that the number of judges on that court be increased to five. Expanding the court's manpower would have the immediate effect of reducing the the number of docketed cases per judge and, up to a point, is a practicable course of action providing at least a temporary solution. It is well recognized, however, that the value of additional personnel may be "dissipated by the increased consultation time, by the difficulties inherent in drafting opinions to accommodate multiple points of view, and by the administrative problems involved in increased personnel."[17] The search therefore should be for a court structure that can be adapted to probable future needs.

The model state judicial article approved by the American Bar Association contemplates a two-tiered appellate court system in which

14. *Report* at 531.
15. See note 13 *supra* and accompanying text.
16. *Report* at 531.
17. Hufstedler, *supra* note 4, at 594.

jurisdiction is shared. Translating that article into Oklahoma's existing system would mean that criminal appeals in the first instance could be made in the court of criminal appeals only in cases where the death penalty or imprisonment for a period of twenty-five years or more has been imposed. In other cases appeals would be made in the court of appeals.

A division of the appellate jurisdiction in criminal cases in the manner proposed should be accompanied by statutes designed to insure efficiency and uniformity within the system. Both courts should have "the power to review all questions of law, and to the extent provided by rule, to review and revise the sentence imposed."[18] The court of criminal appeals should be given general superintendent control in criminal matters over the court of appeals. It should be given the power not only to review by certiorari decisions in the court of appeals but also to transfer cases to itself or among divisions of the intermediate court and, in its discretion, to accept cases from that court by certification for transfer on motion of the court, the state, or a defendant.

Immediate and future advantages would flow from the proposed division of criminal appellate jurisdiction. The number of docketed cases per judge is immediately reduced. The manner in which jurisdiction is divided is clear enough to eliminate jurisdictional disputes. The court of criminal appeals can exercise its transfer power "whenever the urgency of the case or the importance of the legal questions presented, or both, merit direct appeal;"[19] at the same time it can keep its docket within the bounds by the discretionary exercise of its certiorari powers. Moreover, in view of the dominance in criminal matters of the Supreme Court of the United States, a burdensome three-tiered appellate system is neither established for every criminal case nor required in any such case in the sound exercise by the court of criminal appeals of its transfer power.

The existing divisions of the court of appeals, if their dockets permit, can be invested with criminal jurisdiction. As a practical alternative, in view of the specialized nature of issues most frequently raised in criminal appeals, a new, criminal division of that court can be created. And, as the incidence of criminal appeals may increase in the future, additional divisions or panels can be added to the court of ap-

18. ABA MODEL JUDICIAL ARTICLE FOR STATE CONSTITUTIONS § 2B (1962).
19. Hufstedler, *supra* note 4, at 601.

peals, at the same time permitting the court of criminal appeals to keep its calendar within reasonable bounds.[20]

2. Congestion in the Supreme Court.

If it is proper to assume that the backlog of cases in the supreme court has resulted from adding to its normal caseload of original proceedings and all civil appeals, "an ever increasing number of petitions to review by certiorari the decisions of the intermediate court,"[21] the problem has been caused by too much jurisdiction and not enough sound policy.

The constitution provides that "all appeals shall be made to the supreme court, which may, by rule, determine the method of assignment to, and recall from, the intermediate appellate courts until otherwise provided by statute."[22]

No change in the supreme court's appellate jurisdiction has yet been made by statute and, as a result, all appeals in civil cases must be filed in that court. Of such a system, Judge Hufstedler has said:

> Under [this] method the supreme court screens all of the appeals in the first instance and transfers those it does not wish initially to hear to the lower appellate court. *There are such severe drawbacks to this method that it cannot be recommended.* The supreme court would spend far more time upon the screening process than it could possibly be worth, and, in the event litigation rises to the proportions it has in California, for example, the burden would paralyze the court. Even if the volume of litigation did not reach such proportions, *it is a waste of judicial time* to have the cases reviewed potentially three times: once by the supreme court in the first instance, again by the intermediate court if the case is transferred, and a third time if the supreme court is dissatisfied with the decision of the intermediate appellate court. *The value of having an intermediate appellate court is seriously impaired by permitting direct appeal to the supreme court as a matter of right. No state has gone this far . . . .*[23]

No state, that is, except Oklahoma, which did so later in the same year in which Judge Hufstedler delivered her address.

In spite of the drawbacks inherent in a system that centers appel-

20. See text accompanying notes 28-29, *infra.*
21. *Report* at 531.
22. OKLA. CONST. art. VII, § 5.
23. Hufstedler, *supra* note 4, at 599 (emphasis added; footnote omitted).

late review in the highest court, Oklahoma's system could have been made more nearly problem-free had sound policies governing the appellate jurisdiction and its distribution been made.

First, the supreme court could have established, at least for its internal use, guidelines to be followed in deciding whether to retain a case for its own resolution or to assign it for decision in the court of appeals. No particular pattern of case assignment can be discerned from a reading of all of the published opinions of the supreme court and the court of appeals. Cases presenting matters of first impression, involving questions of state or federal constitutional law, or turning on points of foreign law—all kinds of cases—apparently have been scattered at random without much thought as to which tribunal most appropriately should render a "final" decision.

Second, the supreme court could have established a sound policy governing issuance of the writ of certiorari to review decisions in the court of appeals. Under existing procedures, it is relatively easy and inexpensive for a disappointed litigant to petition the court for a writ. Having already paid the fifty-dollar deposit to cover costs when he originally filed his appeal, he is not required to pay an additional fee to invoke the court's certiorari jurisdiction.[24] He need then only prepare a short petition for the writ, put a new cover on the brief presented in support of a rehearing before the court of appeals and now address it to the supreme court as his certiorari brief, and hope the court will grant the writ. Decisions by a majority of the supreme court to grant certiorari apparently are made on an ad hoc basis. Moreover no particular "policy" can be deduced from reading opinions of the court which have affirmed or reversed decisions in the court of appeals. Rather than deciding major policy questions, the supreme court seems sometimes merely to take a different view of things than did the court of appeals.[25] Had the supreme court, following the lead of the Supreme Court of the United States,[26] announced standards governing certiorari review and required a convincing showing of the need for review, it might not now be so inundated with petitions for the writ.

Third, the publication and stare decisis policies established in relation to opinions of the court of appeals encourage certiorari petitions.

24. OKLA. STAT. tit. 20, § 15 (1971); *Report* at 531.

25. Compare, for example, the opinions of the two courts in Lohman v. National Bank of Commerce, 44 OKLA. B. ASS'N J. 2954 (Sup. Ct. 1973), *rev'g* 43 OKLA. B. ASS'N J. 2147 (Ct. App. 1972).

26. *See* U.S. SUP. CT. R. 19, 23.

Until recently, all opinions of the court of appeals were published, but unofficially, and with the following caution: "(*This Opinion Not to Be Considered as Precedent or Authority and Not for Publication in the Official Reporter*)." In spite of the limitation placed on the value of the court of appeals' opinions, they were frequently brought to the attention of trial judges and often followed, as well they should be. Moreover in briefs directed to the supreme court, large portions of the language used in arguments supportive of similar issues have sometimes been lifted from court of appeals' opinions, without, of course, citing a case as authority, though on occasion credit has been given to an opinion's author.

On September 24, 1973, the supreme court announced new policies concerning courts of appeals' opinions:

> Opinions of the Court of Appeals which resolve novel or unusual issues, when unsuperseded and unmodified by the Supreme Court, may be released for publication in the official (Pacific) reporter concurrently with issuance of mandate upon request made to the clerk of the Supreme Court by the presiding judge of the division that handed down the opinion sought to be published. No opinion so published shall have precedential effect but may be considered persuasive. It shall bear the notation "Released for publication by order of the Court of Appeals." An opinion of the Court of Appeals that is specifically authorized by the Supreme Court for publication in the official reporter and bears the notation "Approved for publication by the Supreme Court" shall be accorded precedential value.

The change is not likely to reduce the incidence of certiorari petitions. At least, however, officially published opinions of the court of appeals will now be digested and can easily be found.

Court of appeals opinions designated for publication should be published immediately in the official reporter. Moreover, a principle of law established in such an opinion, so long as it is not reversed, should be binding in all trial courts of the state. The supreme court could use its certiorari power to resolve any conflicting decisions which might occur among divisions of the court of appeals. The proposed policy more nearly accords than does present policy with that followed in the federal system and in other states. If adopted, it should tend to reduce quests for "authoritative" decisions.

Perhaps the Oklahoma Supreme Court's congestion problems could be made manageable merely by adopting sound policies regarding

its appellate jurisdiction in spite of the fact that "[t]he modern trend in structuring a two-tiered appellate system is to eliminate all direct appeals as a matter of right to the supreme court, save only appeals in criminal cases in which the death penalty has been imposed or imprisonment of such length that it approaches a life term."[27] It does seem worthwhile, however, to contemplate both a restructuring of Oklahoma's appellate court system and a reallocation of appellate jurisdiction.

The ABA's model state judicial article envisions only a single court of last resort, whereas Oklahoma currently has one court of last resort for civil cases and another for criminal cases. As an alternative to the earlier suggested dividing of criminal appellate jurisdiction between the court of criminal appeals and the court of appeals, the ABA model could be adopted.[28] Thus direct review in the supreme court would be available as of right only in criminal cases where a sentence of death or imprisonment for a period of twenty-five years or more had been imposed. Other criminal appeals would be made in the court of criminal appeals, which would be of the same stature in criminal cases that the court of appeals is in civil cases, or which could become a division of the court of appeals. All appeals in civil cases would be made in the court of appeals; moreover that court should be given jurisdiction in original proceedings to review decisions of administrative tribunals such as the state industrial court.

Given the power to transfer urgent and important cases to itself and to review by certiorari decisions in the intermediate court, the supreme court would thus be given the ability both

> to keep its calendar within the bounds of its resources and . . . to serve the primary functions of a court of last resort, i.e., deciding major policy questions, giving shape and direction to the growth of substantive and procedural law, giving authoritative expression upon questions as to which there has developed a conflict among lower courts, and finally exercising its supervisory power over the entire judicial structure.[29]

Final decisions in most cases would be achieved in the intermediate court. In other cases, decisions in the intermediate court would

27. Hufstedler, *supra* note 4, at 599 (footnote omitted).

28. A restructuring of the appellate court system can be accomplished by the Legislature without the need for further constitutional amendment. OKLA. CONST. art. VII, § 1.

29. Hufstedler, *supra* note 4, at 601.

be helpful to the supreme court. Writing about constitutional question cases, the late Chief Justice of the United States, Harlan Fiske Stone, has said: "The public little realizes how much is accomplished by passing through an intermediate court—the clash of counsel, the preparation of briefs and judicial decision, before the case comes to the Supreme Court—often does much to clarify the question and the minds of court and counsel in dealing with it."[30]

Restructuring the intermediate appellate court and conferring on it the bulk of original appellate jurisdiction makes the judicial system adaptable to probable future needs. As the incidence of apellate litigation increases, additional judges can be added to the court of appeals to meet caseload needs. Moreover, the court of appeals should be permitted to achieve maximum efficiency by being authorized to sit throughout the state in panels, such as is the practice among the United States Courts of Appeals. Rather than having to create additional three-judge divisions, a single judge could thus be added to the court at any time to keep its docket within bounds.

Finally, in any consideration of appellate system reform, the Legislature should renew its efforts to reduce the size of the supreme court. Only Oklahoma and four other states—Iowa, Mississippi, Texas and Washington—have nine-member supreme courts. Almost half the states have seven-member courts; the rest have between three and five members. Those factors which militate against a substantial increase in membership on the court of criminal appeals also indicate that a reduction in supreme court membership may be desirable.[31]

Judicial Selection and Tenure

No discussion of judicial reform is complete unless it treats judicial selection and tenure, a topic much discussed but elusive of a consensus. Oklahoma, for example, has not settled on a single pattern. Judges of the state industrial court are appointed by the Governor with the advice and consent of the Senate and serve six-year terms.[32] District and associate district judges, for a four-year term, and judges of the court of appeals, for a six-year term, are elected in nonpartisan elections.[33] Special district judges are appointed by the district judges and

30. Quoted in A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 386 (1956).
31. See text preceeding note 17 *supra*.
32. OKLA. STAT. tit. 85, § 69.1 (1971).
33. OKLA. CONST. art. VII, §§ 8(f), 9; OKLA. STAT. tit. 20, § 30.9 (1971).

serve at their pleasure.[34] Justices of the supreme court and judges of the court of criminal appeals, after initial appointment by the Governor from a list of nominees submitted to him by the Judicial Nominating Commission, may be retained in office for six-year terms and face the electorate only on a "retention-in-office" ballot.[35]

Perhaps any method of judicial selection has drawbacks. Election of judges, whether on a nonpartisan or "retention-in-office" ballot, is accomplished by an electorate largely unfamiliar with the candidate and his qualifications. Furthermore, on what basis shall judicial candidates "campaign"? Nor is the appointment of judges through a nominating commission free of shortcomings. Many well qualified lawyers may be reluctant to "apply" for a judicial post; failure to be selected as a nominee or to be appointed is potentially embarrassing. A nominating commission may be subjected to substantial gubernatorial influence or pressure in the selection, or non-selection, of nominees. Lastly the commission's deliberations are not subject to public scrutiny.

Perhaps what is most needed in judicial selection is examination in public of a potential judge's qualifications and background. Gubernatorial nomination and Senate confirmation appears to be a reasonable means of selection, especially if coupled with the requirements of endorsement by an arm of the organized bar and of public hearings before an appropriate Senate committee after a staff investigation of the nominee. Properly utilized, the process proposed should eliminate doubts as to a nominee's qualifications and resolve possible conflicts of interest, and it is suitable to selection of all but special district judges.

In regard to judicial tenure, there is one point upon which near unanimity of opinion exists: the decisional process must be insulated from politics and political pressures. Oklahoma's system, by requiring electoral retention or re-selection of judges after short periods or terms, may fall short of that desirable goal. Federal judges are insulated from politics by lifetime tenure during good behavior—a plan not without critics, though much of the criticism would be eliminated if removal from office could be accomplished other than by impeachment. An alternative for Oklahoma is longer terms, which incidentally should make the judicial office more attractive to well qualified persons. Judges of the New York Court of Appeals, for example, serve fourteen-year terms. Efforts should be made to lengthen the terms of Oklahoma

34. OKLA. CONST. art. VII, § 8(h).
35. OKLA. CONST. art. VII-B, §§ 2, 4, 5.

judges to insure that they may reach decisions independent of political considerations. The power of the Court on the Judiciary to remove and retire judges from office for cause, but not including political grounds,[36] largely reduces objections to longer judicial tenure.

Conclusion

While Oklahoma's judicial system is a good one, it can be improved. We should never be satisified with the state of the judiciary if it can be bettered by change. If these thoughts for judicial reform receive reactions, favorable or unfavorable, or stir up controversy, the purpose of this essay has been achieved.

36. *See* OKLA. CONST. art. VII-A, § 1(b), (c).