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OKLAHOMA MOVES FORWARD IN JUDICIAL SELECTION

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On July 11, 1967, Oklahoma voters adopted a completely new judicial article for the state constitution, including a merit selection and tenure plan for the supreme court and court of criminal appeals and non-partisan election for judges of the district court.[1] With this step Oklahoma abolished partisan election as a method of selecting judges and became the seventh state to establish a nominating commission for judicial appointments to its highest appellate courts.[2]

The new judicial article accomplished many other things as well, such as the elimination of justices of the peace, the reorganization of all courts into a basic two-level judicial system of trial and appellate tribunals, the authorization of the appointment of a court administrator, and the authorization of a judicial retirement system. Many of these changes have been ably reviewed by Professor George B. Fraser in the November 1968 *Oklahoma Law Review*.[3] This article will be

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[1] OKLA. CONST. art VII, VII B.

[2] States previously adopting such a plan were Missouri (appellate and metropolitan trial courts), Alaska (all courts), Kansas (appellate), Nebraska (all courts), Iowa (all major courts) and Colorado (all courts).

[3] Fraser, *Oklahoma's New Judicial System*, 21 OKLA. L. REV. 373 (1968).

limited to the change in methods of selecting judges with some discussion of the amendment campaign.

I. SELECTION OF JUDGES

Portions of the new judicial article became effective January 13, 1969. The provisions for merit selection of appellate court judges became effective upon adoption. Since there have been no vacancies, the difference in dates has not been significant. The establishment of the nominating commission as a constitutional body did make it immediately available for use by Governor Dewey Bartlett on a voluntary basis for filling vacancies in other courts.

The nominating commission is composed of thirteen members. Six are laymen appointed by the Governor, one from each congressional district as existing at the time of the amendment. Six are lawyers elected by the active members of the Bar under rules established by the Board of Governors of the Oklahoma Bar Association. The lawyers are also elected by congressional districts. The thirteenth member is a layman selected by not less than eight of the other members of the commission. Terms of six years are staggered so that two lawyers and two laymen are named to the commission each two years.

Other constitutional provisions include the filling of vacancies among lay commissioners by the Governor and among lawyer members by the Board of Governors of the Oklahoma Bar Association. Members serve without compensation but necessary travel and lodging expenses are paid.

Several provisions are aimed at reducing political influence and control in the commission's operation. No more than three of the layman commissioners named by the Governor may be of the same political party. No such restriction applies to the lawyers. Oklahoma lawyers have never followed political party lines in connection with Bar Association matters. The legislature undoubtedly recognized this in

placing no restriction on the political affiliations of the lawyer members.

No commissioner may succeed himself. A commissioner is not permitted to hold any other public office by election or appointment and he may not hold office in any political party. A commissioner is not eligible for appointment as a judicial officer while member of the commission or for five years thereafter.

When a vacancy occurs on either high court, the nominating commission submits to the governor and the chief justice of the supreme court three nominees, each of whom has previously indicated to the commission his willingness to serve. The governor appoints one of the nominees to fill the vacancy. If he fails to make the appointment within sixty days, the chief justice is directed to appoint one of the three.

Justices of the supreme court and court of criminal appeals who were in office at the adoption of the amendment were retained in office. They and all justices thereafter appointed are subject to review by the voters at a retention election. In the retention election the justice's name is on a judicial ballot which simply contains the question "Shall Judge _____ be retained in office? ☐ Yes. ☐ No." If the justice fails to get a majority of the votes cast, he is removed. In such an event, the nominating commission will submit three nominees to the governor for appointment to fill the vacant post.

When a justice of one of the two high courts is appointed, his name is submitted to the voters at a retention election concurrent with the first general election after he has served a full twelve months in office. The voters thus have the opportunity to approve or reject the appointee.

Under the 1967 amendment all judges of the district court, except special judges, and all judges of the new court of appeals are to be elected on a non-partisan ballot. If only one

candidate files for a judicial office, he is declared elected. If two candidates file, their names are placed on the ballot in the general election. If more than two file, their names are placed on the ballot at the primary election, and the two receiving the highest number of votes go on the general election ballot.

The districts from which judges are elected vary considerably. One court of appeals judge is elected from each congressional district. District judges are elected within their districts, but in some multi-county districts nominating districts may cover only a portion of the entire judicial district. In the latter situation the primary election is in the nominating district with the two highest going on the ballot district-wide in the general election. Associate district judges are elected by the voters in their own county of residence only.

The final method of selection is that provided for special judges. These judges are appointed by the district judges in the judicial administrative district. Their service is at the pleasure of the district judges.

It may readily be observed that judicial selection in Oklahoma now consists of three types: merit selection with a nominating commission and retention elections at the top level, non-partisan election for the trial courts and the intermediate appellate courts, and appointment by the judiciary itself at the special judge level.

II. THE CAMPAIGN

The changes made in judicial selection did not come easily, and for many Oklahomans were not enough.

The principle of merit selection of judges through the use of nominating commissions has been endorsed by the Oklahoma Bar Association for many years. The bar's official position since 1962 has favored such a plan for the appellate courts with a local option feature for its application at the trial court level.

In December, 1962, the Conference on Modern Courts for Oklahoma in its consensus 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 the 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."[4]

It should be noted that in addition to partial adoption of merit selection most of the older reforms advocated by the 1962 conference have been enacted by the 1967 amendment. An immediate result of the 1962 conference was the formation of the Oklahoma Institute for Justice, a non-profit educational organization, whose purpose was to disseminate information about Oklahoma's courts. This group, composed both of lawyers and laymen, cooperated with the Committee on Administration of Justice of the Oklahoma Bar Association to promote and maintain interest in judicial reform. The Institute was especially helpful in bringing public attention to the need for a better system of judicial discipline. These efforts led to the adoption of the Court on the Judiciary by constitutional amendment[5] in 1966, a measure defeated by the "silent vote" in 1964.

Meanwhile Oklahoma had been severely embarrassed by a judicial scandal involving its highest court. A retired supreme court justice pleaded nolo contendere on a federal income tax evasion charge. A sitting justice was convicted of income tax evasion, and, finally, a third justice was removed from office after an impeachment trial on bribery charges. The impact on the state and nation was tremendous; court

[4] 46 J. AM. JUD. SOCY. 150, 151 (1962).

[5] OKLA. CONST., Art. VII A.

reform advocates multiplied and pressed determinedly for meaningful reforms.

In the spring of 1966 a new organization known as Judicial Reform, Inc. was created. Its avowed purpose was the adoption of a completely new judicial article providing for streamlining of the courts and merit selection at all levels. Known locally as the Sneed Plan because it had been modified for Oklahoma by Earl Sneed, former dean of the University of Oklahoma Law School, the proposed article was essentially the model judicial article proposed by the American Bar Association.

In 1965, a commission appointed by Governor Henry Bellmon, after extensive study, approved and endorsed the Sneed Plan. Its recommendations, however, were never made public following its report to the governor.

In the summer of 1966 the League of Women Voters undertook the circulation of an initiative petition for the Sneed Plan amendment. Despite what politicians regarded as overwhelming odds the League obtained 142,377 signatures. Since the number was insufficient to force an election, if based upon the total vote cast in the 1964 general election, but sufficient if based upon the primary election vote which occurred during the campaign, a challenge was made and a court decision required.

While the protest was being considered, legislative leaders became impressed with the possible success of the Sneed Plan and promptly began work on what came to be called the legislative court reform plan. This move was engendered by a combination of factors. The Sneed Plan would have given control over all facets of the court system, except appropriation, to the supreme court. This was viewed with alarm by many legislators. Another controversial feature was the extension of merit selection to district judges while many legislators favored the continued election of all judges. A number of members of the legislature realized that substantial

court reform was imperative but were unwilling to go quite as far as the Sneed Plan.

Court reform was an important issue in the gubernatorial election of 1966. Preston Moore, the Democrat candidate, supported the continued election of all judges. Dewey Bartlett, the Republican candidate, supported merit selection using a nominating commission for the appellate courts. In addition, he pledged to use a nominating commission on a voluntary basis for the filling of all vacancies until a constitutional amendment was adopted.[6] Of course, many other issues were present in the Governor's race but Bartlett's election indicated that many voters were ready for a change in the court system.

When the legislative session of 1967 commenced there was general agreement among the legislators that some sort of change would be required to forestall adoption of the Sneed Plan. It soon became apparent that the House of Representatives would support elimination of the justices of the peace and court reorganizations, but were lukewarm on merit selection. The Governor and the Senate leadership were insistent on merit selection, at least on the appellate court level, as a part of the package. As a compromise the two houses agreed upon something unique in the history of judicial reform, a separate vote on the question of merit selection versus popular election. The basic reorganization plan was submitted on a white ballot (State Question 448). Merit selection and tenure was submitted on a separate yellow ballot (State Question 447). The ballot provisions required that both measures receive a majority vote before merit selection could be adopted.

The election on the new judicial article was called for July 11, 1967. Since the legislature did not finish the proposal until mid-May, little time remained for a campaign.

[6] 37 OKLA. BAR ASSOC. J. 814 (1966). Reprinted 37 OKLA. BAR ASSOC. J. 2012 (1966).

The Oklahoma Bar Association had singly endorsed various portions of the proposal previously. It therefore felt obliged to take a position on State Questions 447 and 448. This was especially true of 447, since the merit selection proposal was essentially the Bar's language.

At a specially called meeting of its House of Delegates on June 10, 1967, the Oklahoma Bar unanimously endorsed the white ballot (reorganization) proposal and endorsed the yellow ballot (merit selection) by a vote of 59 to 8. This was the greatest demonstration of unanimity on a judicial reform proposal in the history of the association.

It soon became apparent that although the amendments had originated in the Legislature (albeit with much help from the Bar's Committee on Administration of Justice) lawyers would have to lead the campaign for passage. This was done reluctantly since the experience of other states indicated that a lawyer-led movement would have great difficulty. The Committee on Administration of Justice of the Oklahoma Bar Association accordingly became the campaign committee. No dues money was used in the election campaign. A quick letter campaign with some direct solicitation brought in about $10,000. In addition, lawyers raised money in a number of local communities for local efforts.

The bulk of the contributed funds was used for small newspaper ads, and 10 and 30 second radio and television spot announcements. Tulsa lawyers mounted a special drive and from the funds raised published half-page ads in the *Tulsa Tribune* and *Tulsa World* on election eve and election morning. Similar ads were run in papers in other cities.

A public relations agency was employed to handle campaign advertising. In addition to producing the advertising and spot announcements, the agency sent an informative press release to every newspaper in the State. The releases were widely used.

In many communities very effective local work was done

by lawyers or county bar associations. Lawyers spoke to many groups, including lawyer-laymen forums, civic clubs and institutes. In cooperation with county bars and the county bar organization committee lawyers met at eight locations. In view of the short time available this was a remarkable accomplishment in itself. Many county bars had their own meetings.

The media aided greatly in informing the voters. The state's newspapers generally carried informative stories, with many taking editorial stands. Television stations KOTV and KVOO in Tulsa each carried half-hour public service programs presenting all sides of the issues. KRMG radio in Tulsa had a full hour debate and KTOK in Oklahoma City had a similar program. News coverage, especially in the last week of the campaign, was good in all media — newspapers, radio and television.

Layman activity other than in the news media was limited. In part this was due to the shortness of time. There was also a feeling that anything bearing the label of judicial reform was sure to pass. As it turned out the margin was slight. But for the Bar and the news media, the measures very likely would have failed. A study of the county by county returns shows that the measures ran well where the lawyer population was greatest.

The *Tulsa Tribune* recognized the Bar's role in the campaign in its editorial of July 12, 1967, which said:

> Congratulations are due particularly to the Oklahoma Bar Association this time. There have been occasions in the past when the Bar seemed all too willing to compromise its internal differences by sitting on its hands at moments of history.
>
> This time it was active in the construction of the reforms, in their promotion, and particularly in the campaign for their passage. The Bar — particularly in Tulsa — asserted the sort of leadership so long needed in this state, and we are all better for it.

Opposition came primarily from the justices of the peace. Using old style campaign methods, they were most effective in rural counties. Many rural voters misunderstood the effect court reorganization would have upon county finances. Some, voters either did not understand or did not trust statements from legislative leaders that small claims and traffic cases would continue to be handled with convenience to the citizens, but with greater justice.

Organized labor announced its opposition, especially to merit selection, but no significant effect materialized. Labor precincts in Tulsa, for example, generally favored the measures, although by smaller majorities than in other sections of the city.

The election results were interesting in another respect. The white ballot (reorganization State Question 448) received 89,741 "Yes" votes while 73,247 voted against it. The yellow ballot totals were 86,224 "Yes" and 78,977 "No". Thus Oklahoma voters approved merit selection for appellate judges on a direct independent vote.

III. EPILOGUE — RECOMMENDATIONS

Events since the adoption of the amendment have continued to be interesting. The legislature faced a huge task in rewriting the statutes to conform to the new system. An excellent job was done. Of course, with all reforms there are unforseen problems, and some confusion resulted from the complete change-over to the new court system on January 13, 1969. Legislative leaders are continuing to work on improvements as they appear necessary.

The political history of court reform in Oklahoma to date is not complete without a discussion of the Sneed Plan. It came to a vote in September of 1968, and was defeated by 115,620 to 171,620.

Circumstances affected its chances adversely. It was written before the legislative plan saw the light of day. Conse-

quently, some of its provisions would have been awkward after the adoption of the new amendments. For example, county judges who were just about to become associate district judges were called magistrates in the Sneed proposal. Since associate district judges were unknown at the time the plan was written this was no fault of the author, but it was representative of several similar problems.

The initiative proposal did not have the overwhelming support of the bar itself. The House of Delegates of the Oklahoma Bar Association approved it only by a small margin. This narrow margin permitted an approval only in principle, and not as a part of the Bar's legislative program. Lawyer opponents were more vocal than in the July, 1967, campaign, and the Bar itself, under its rules, could take no official part in the battle.

In September, 1968, the news media were not in accord. While most of the metropolitan press supported the measure, the *Tulsa World* vigorously opposed it. The *World's* effect was most noticeable in Tulsa where the vote was extremely close.

There was also doubt in many circles whether so much power should be given to a court which had so recently seen three of its own judges publicly charged and convicted. The combination of factors, coupled with the fact that much had been accomplished by the July 1967 amendments, prevented the measure's carrying.

One factor should be mentioned for the benefit of future movements, which will surely come. The initiative plan, backed by Judicial Reform, Inc. and the League of Women Voters, both as to its formulation and the campaign for its adoption, was the product of relatively small committees. Except for the League of Women Voters, no large group of either lawyers or laymen was asked to participate in its drafting. Its principal sponsors felt in 1966 that action was urgently needed and that a general citizens and lawyers conference to discuss de-

tails of the plan prior to circulation of the petition would waste time. Perhaps they were right insofar as pressure on the legislature is concerned. If that were the primary objective, they were superbly successful. However, the lack of a broad group feeling as a part of the program proved to be a distinct disadvantage in the campaign itself. Human nature being what it is, there is a reaction by many when any small group presents a program for ratification without allowing the public an opportunity for discussion and revision before making a decision.

Future moves for judicial reform should involve a broad cross-section of lawyers and laymen prior to finalization of the plan. In the case of the Sneed Plan, some opposition could have been eliminated without damage to the overall concept if enough persons had been consulted. The treatment of the industrial court is a case in point. Although the arguments in opposition were in some instances without foundation, most of the complaints on the subject could have been met at the drafting stage.

In November, 1968, the first retention election was held under the new plan. Three justices of the supreme court and one judge of the court of criminal appeals were on the ballot. The Oklahoma Bar Association took a secret ballot poll of its members prior to the election and announced the results about 10 days before the general election date. Bar members favored the retention of the three supreme court members by a wide margin but voted against the retention of Judge Kirksey Nix of the court of criminal appeals.

Judge Nix responded in statements to the press and with large newspaper advertisements on the week-end before the election. Many newspapers editorially opposed him. He was retained by a vote of 337,000 to 309,000, while the retention vote in favor of the supreme court justices was almost three to one.

Several conclusions may be drawn from these results. A

sitting judge with bar support need not worry about campaigning. Without bar support a sitting judge is in trouble and may need to campaign vigorously. However, in the event of such a campaign, members of the Bar must also be prepared to support their position in the press and with the public. To be completely effective the Bar poll must be taken earlier than it was in 1968 so that the results may be announced in time for full public discussion. In 1968 the Bar had no time to respond to the statements and advertisements of Judge Nix. An interchange might have been helpful to the voters.

Critics of the plan have said the retention election is meaningless. To the contrary, the election showed that the voters do have a voice. A small shift in voter sentiment would have effected a change. Colorado also had its first retention election in November, 1968, including its judges in trial courts, and three sitting judges were removed by the voters.[7]

This article would be incomplete without reference to Governor Dewey F. Bartlett's use of the nominating commission on a voluntary basis. While a candidate the governor had pledged to use such a commission in a letter to the Oklahoma Bar Association.[8] After his election in 1966, the House of Delegates of the Oklahoma Bar adopted a resolution offering him its cooperation in setting up procedures to designate the lawyer members.

The first voluntary commission was set up early in 1967 and immediately called upon to perform. District Judge C. R. Board in the first judicial district resigned. The voluntary commission was asked to submit three names for appointment. It provided the names of three outstanding lawyers who would be willing to accept appointment, although it is doubtful any of them would have run for the office. The non-par-

[7] 51 *Judicature* 182, 183 (1969).
[8] 37 OKLA. BAR ASSOC. J. 814 (1966).

tisan character of the plan was demonstrated with the appointment by republican Governor Bartlett of Merle Landsden, an outstanding lawyer who also is a democrat and a former Speaker of the State House of Representatives.

Governor Bartlett has continued to use first the voluntary commission and then the constitutional commission for all appointments. The legislature has implemented the voluntary use of the commission for trial judge appointments by authorizing the payment of the commission's expenses when so used.[9] Use of the commission in making appointments to fill vacancies on the newly created court of appeals has also been authorized by statute.[10]

Thus the commission system has already been used in the appointment of trial judges although it has not yet been needed for its constitutional purpose. Lawyers have been well pleased with the caliber of the appointees and the appointments have been truly non-partisan in nature. The spirit as well as the letter has been observed.

Since district judges will not be elected until 1970 there has been no test of the non-partisan popular election feature on the district court level. Associate district judges were elected in November, 1968. 49 out of 78 of them were elected without opposition. Of 21 sitting judges who were opposed, only 10 were re-elected.

Two observations may be made from these figures. First, it should be noted that the voters had no opportunity whatever to express themselves on over half of the judges, since they were unopposed. Second, incumbents were far less successful at the polls than in previous years.

The fear of non-partisan election stems largely from the risk that the unknowing voter will vote on some basis other

[9] 51 O.S. §10 (Supp., 1968).
[10] 20 O.S. §30.1 (Supp., 1968).
[11] 48 J. AM. JUD. SOC'Y 124, 125 (1964).

than judicial competence. In other states the "famous name" has sometimes upset the faithful, hard working judge.[11] Even in Oklahoma, in November 1968, Judge Haskell Holoman, who had been county judge of Kiowa County and had done yeoman service as president of the County Judges Association in supporting the court reform program, was defeated for re-election.

Most authorities feel that non-partisan election will not prove to be satisfactory in the future and that Oklahoma will follow Nebraska in moving from non-partisan election to merit selection for the trial courts. More and more states are turning to the nominating commission-retention election system. No state which has adopted it has ever gone back to another plan. Especially as our metropolitan areas grow the need for merit selection of trial judges will increase.

Oklahoma has come a long way in the last three years. Partisan politics have been eliminated and merit selection has been adopted for our highest level of courts. We have abolished the fee system of justice and have a decent judicial retirement system. We have created a modern form of organization in place of the hodge-podge which previously existed. These are giant steps but interested Oklahoma lawyers and laymen are not content to rest on their laurels. The goal for the future should be nothing less than the best judicial system in the nation.