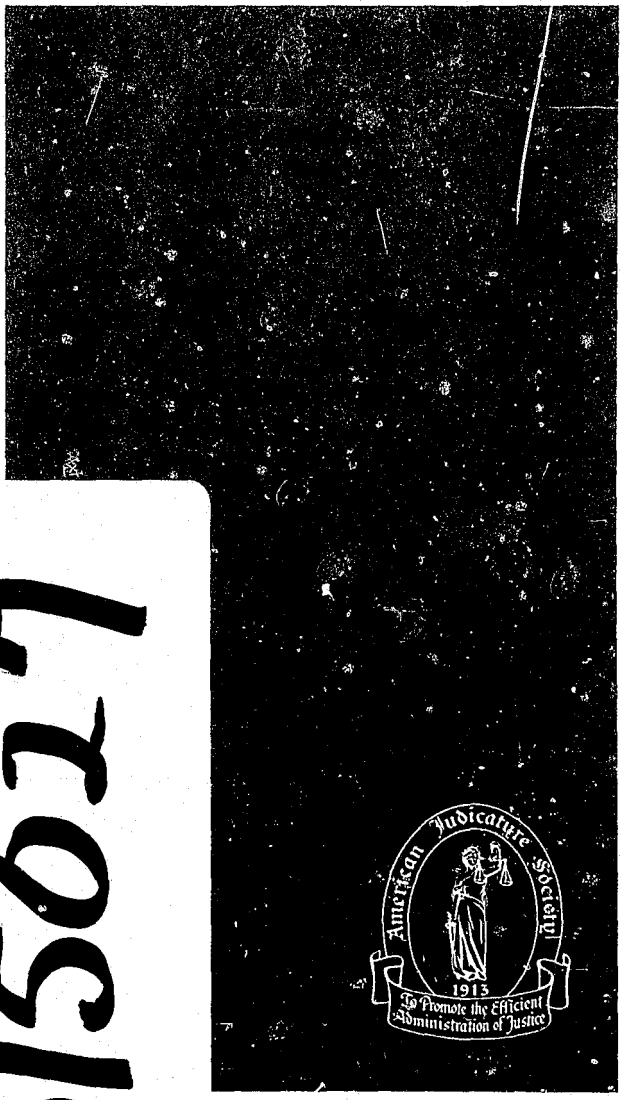
Fact and Fiction about Judicial Selection



an Judicature Society

THE AMERICAN JUDICATURE SOCIETY *is a national and international organization of over 45,000 lawyers, judges and laymen, in all 50 states, Canada and 58 other countries of the world, founded on July 15, 1913, to promote the efficient administration of justice. Its activities include publishing a monthly journal and other books and literature; conducting meetings, institutes, conferences and seminars; and maintaining an information and consultation service with respect to all aspects of the administration of justice and its improvement. Voting memberships are open to all lawyers, judges and laymen interested in the betterment of the administration of justice. Dues are $20.00 a year, and include a subscription to JUDICATURE, the Society's monthly journal. Persons interested in membership should write directly to the Society at 1155 East Sixtieth Street, Chicago, Illinois 60637.*

Fact and Fiction about Judicial Selection

Updated April, 1974

There is no area of government in this country which is less understood than the administration of justice under law in our courts.

Not only is the man in the street unaware of how the third branch of government operates, but civic leaders of local, state and national life are uninformed about the judiciary and its functions in our society. It must also be acknowledged, albeit without pride, that altogether too many members of the legal profession, both bench and bar, are shamefully ignorant about the courts.

The most striking example of this compounded ignorance about the administration of justice is in the field of judicial personnel. Virtually everyone has an opinion about judges, but very few people have informed opinions. And yet, it has consistently been demonstrated that when civic leaders and members of the legal profession seriously study the problems of judicial personnel, intense interest is created, and there is always a demand for improvement.

The common misconceptions about judicial selection enumerated in this article are those that have been found among the many thousands of leading citizens who have attended Society conferences or meetings on this subject. These are, of course, not the only false ideas about selection of judges, but they are the ones that seem to recur most frequently.

Fiction: It does not make much difference personally to the average citizen who may be a judge.

Fact: If a person never has to go to court

and has no sense of civic responsibility for those who do, this may be true. It makes no difference to Mr. Average Citizen what kind of fire engines or personnel the local fire department employs, if he never has a fire. But any night a fire may break out; and also any night a police officer may come to the door and, before the sun rises, Mr. Average Citizen may find himself falsely accused and in jail. At this point the judge becomes the most important person in the world to him.

Fiction: The only method of selecting judges is the one used in my state.

Fact: There are five leading systems of judicial selection used in America today:

1. Appointment, with or without confirmation
2. Selection by the legislature
3. Partisan political election
4. Nonpartisan election, and
5. A combination of nomination by commission, appointment, and periodic re-election.

Within each of these five systems, there are as many variations as similarities, and many states now use two or three of the five systems for selecting judges for different kinds of courts.

Fiction: The elective judiciary is a part of the American heritage.

Fact: If the great men who founded our nation were to come back today, they would find many surprises, but none more startling than the elective judiciary. They never thought of such a thing.

Our forefathers 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 later, in the era of so-called "Jacksonian democracy," that popular election of judges for short terms came into vogue, following New York's lead in 1846. Within 20 years a reaction set in, and there has been dissatisfaction and debate ever since.

Fiction: The federal appointive system is less political than election.

Fact: Life tenure does, indeed, take a judge out of politics once he has been appointed. But with both Republican and Democratic presidents averaging better than 95 per cent of appointments from their own party, with senators of the president's party dominating appointments in their states, with appointments going to politicians who have been pronounced unqualified by those best fitted to assess their judicial fitness, with vacancies left unfilled for political reasons while backlogs accumulate—it can hardly be argued that the federal system provides an effective method of taking judges out of politics.

Fiction: Judges are actually elected in so-called elective states.

Fact: Most American judges have gone on the bench by appointment—not by election. This is true even in states whose constitutions provide only for election of judges.

The reason for this is an almost universal provision that in case of a vacancy caused by death or resignation, the governor may appoint a new judge to fill out the remainder of the term. This is the way most vacancies occur, and so a majority of the judges even in the elective states have become judges by appointment, not election.

Some representative examples might suffice to make the point. Texas and North Carolina both have constitutions providing for partisan election of judges. Yet in 1973, fully half of the judges on Texas' supreme, criminal appeals and civil appeals courts had been appointed by the governor to fill a vacancy, and at the district (trial) court level, the percentage exceeds two-thirds. In North Carolina, more than 80 per cent of all the judges had been initially appointed, including all members of the supreme court and court of appeals.

Even in states which provide for election on a non-partisan ballot, the situation is no better. In Washington, six of the nine Supreme Court justices sitting in 1973 were appointed, as were

75 of 98 superior court (general jurisdiction trial court) judges. The Court of Appeals was established in 1969 with the proviso that the first judges be appointed, but since then, only one judge has been defeated in a retention election. In neighboring Oregon, all seven Supreme Court judges were initially appointed, and only one Court of Appeals judge (out of five) was elected. Out of 63 circuit judges (general trial jurisdiction) 57 were appointed, and of 39 district judges (limited jurisdiction), 34 were initially appointed, according to a 1972 study. In Minnesota, a 1972 survey showed 93 per cent of all that state's judges were initially appointed to fill a vacancy.

These recent figures buttress the classic study on supreme courts of 36 so-called elective states, which found that between 1948 and 1957, over 56 per cent (242 out of 434) justices went on the bench by appointment.

If to the number of judges formally appointed to fill vacancies is added those *de facto* appointees whose names are selected by political party leaders to run without opposition or on coalition tickets (so that the voters have no choice)—then the percentage is even higher.

Fiction: Minorities and special interests are better served by the elective judiciary.

Fact: In the first place, minorities have a better chance of attaining judgeship through appointment than through election. If they are a minority, they will be defeated when the votes are counted, but governors are anxious to curry the favor of minority blocs, and appointments are a very popular way to do it. A 1973 survey by the American Judicature Society of the nation's 286 black judges indicates that almost two-thirds obtained their judgeships through some form of appointive process.

Fiction: The people really want to elect their judges.

Fact: We need to distinguish between what people say they want and what their actions *show* they want.

Nobody likes to have anything taken away from him, and if people are told they are

going to be deprived of their right to have judges of their own choosing it is not hard to raise a protest. But look at the voting on election day. The judicial ballot is always the most neglected. There is good reason for this: normally the people are unfamiliar with the candidates and don't know which ones to vote for, and so they simply leave the ballot blank.

Fiction: The few voters who do vote for judges know for whom they are voting.

Fact: A survey of 1,300 men and women in New York immediately after the 1954 general election revealed that while virtually all could remember the name of the gubernatorial candidate for whom they voted, over 75 per cent of those who voted for judges could not name one of the judicial candidates for which they had voted.

But the most revealing fact was that 402 of the 1,300 interviewed were from a semi-rural area, Cayuga County, and over 95 per cent of this group could not name one judicial candidate for whom they had voted.

Fiction: If voters are not qualified to pick a judge in the first place, they are not qualified to decide whether or not he should be kept in office.

Fact: The question of whether a judge should be retained in office is much different than that of who should be selected to become a judge. On initial selection, only the best is good enough, and the most careful evaluation of candidates should be made. Once a lawyer has sacrificed his practice and made a life investment in a judicial career, however, the only relevant question is whether or not he has done so badly that he should be removed. If so, the voters should have the right to remove him.

On rare occasions, judges have been voted out of office on the noncompetitive ballot where the judge runs only against his record. On the other hand, judges who are doing responsible jobs, should have the job security which this system regularly gives. This is not "freezing a judge in office." It is businesslike

conservation of talent and experience on the job. It is also a retention of the people's right to decide who shall continue to serve as their judges.

Fiction: Nonpartisan election takes judges out of politics.

Fact: Nonpartisan election usually does take judges out of *party* politics, but it only substitutes the politics of nonpartisanship. No longer need the voter fear the power of political bossism, but he now has to fear the equally dangerous dictatorship of irrelevancy.

Whichever candidate has the catchiest name, the biggest campaign fund or the most appealing profile will win. There is no guarantee of even minimum competence. In fact, if a person is good enough as a lawyer there is some probability that he will not run for judicial office. He can't afford to take the risk, especially if he must fight to defend himself against any and all challengers every few years by political means, and without any help from a party.

With exceptions, of course, this system tends to put on the bench men who have little or nothing to lose if they don't make it and who will earn enough more as a judge (even at modest judicial salaries) than they could earn otherwise, to make the risk worthwhile.

Fiction: Experience in nonpartisan states has demonstrated the success of the nonpartisan system.

Fact: The reverse is true.

There is just as much dissatisfaction with the elective system in nonpartisan states as in partisan states, and just as many reform campaigns under way. Nebraska, formerly a nonpartisan state, was the first to change to the merit plan for selection of its state court judges. Active reform campaigns for adoption of the merit plan have been waged in a number of states since then, with Wyoming the most recent convert to the plan.

Fiction: Being a judge is no different than being a lawyer.

Fact: Becoming a judge is much like becoming a brain surgeon. Being a good practitioner, at law or medicine, is not enough. Specialized training and experience are necessary. Any thoughtful judge will gladly admit that it took three to five years of judicial experience before he began to feel that he was competent to do his job.

This experience and competency results from investments, not only by the judge but by the public, both taxpayers and litigants, who have borne the expense of that training. Election landslides which have swept hundreds of trained judges out of office without reference to their experience or competency are a costly luxury which no society can afford.

Fiction: If a man is a good lawyer he will make a good judge.

Fact: He might. But the lawyer's job is to urge one viewpoint so hard that it will win; the judge's is to weigh and compare so carefully that he will rule the right way regardless of the lawyer's urging. These are different skills. One may have, or acquire, both, but they do not necessarily go together.

On the other hand, it is equally unsound to say that a man does not have to be a good lawyer to be a good judge. Many people think that if a judge is honest and well-meaning, a good family man, a decent and respectable citizen, he can be trusted to do what is right on the bench. They should try arguing a case before one of these judges once, or listen in and see how frustrating it can be to a good lawyer—and how often such a judge does injustice rather than justice.

Fiction: Any lawyer has a "right" to be a judge and the Merit Plan somehow deprives him of that right.

Fact: Even the practice of law is only a privilege, not a right. Certainly nobody has an automatic right to be a judge. Every lawyer should be equally eligible to be considered for judicial office, but it is the right of the people who are going to be judged that only the applicant best qualified in ability, temperament and

character be chosen. The means most likely to pick the best man on those bases is the fairest to everybody.

Fiction: The combination system, best known as the "Merit Plan", is a new and untried method for selecting judges.

Fact: The combination nomination by commission, gubernatorial appointment and periodic noncompetitive re-election plan was first advocated by the American Judicature Society in 1913. Missouri became the first state to put it into operation in 1940.

In brief, this combination plan provides for appointment of judges by the governor from a list of nominees selected by a nominating commission made up of laymen and lawyers. Each of the judges so appointed then goes before the voters periodically on the sole question of whether or not he is to be retained in office, without competing candidates on the ballot.

Fiction: With a Merit Plan nominating commission, judges are actually chosen by lawyers.

Fact: If the commission were composed solely of lawyers, this would, of course, be true. But no commission is so composed and none should be. All have *some* lawyers, because the commission cannot do its job without professional appraisal of the candidates' professional qualifications. Nobody but a lawyer can adequately evaluate a judge's legal skill. Doctors and nurses work together in hospitals somewhat as lawyers and judges do in court. Who knows better than the nurses which are the most competent doctors and vice versa? But all commissions have non-lawyer members and it is their job to see to it that character, experience and other factors as well as legal ability are taken into account by the commission.

Fiction: The only lawyers who are nominated and appointed under the Merit Plan are "conservative defense attorneys" from the big law firms.

Fact: With almost a quarter of a century

of experience in Missouri, the opposite has been found to be true.

Most of the lawyers nominated and appointed have either held public office or been individual practitioners or have come from law offices with three or less lawyers. Of the lawyers in private practice who have been appointed, most have been known as general practitioners who would try any case that came in the office, whether it was a plaintiff's case or a defendant's case.

Fiction: Under the Merit Plan, governors always appoint members of their own party so that the plan still keeps judges in politics.

Fact: Missouri governors have most often chosen from the commission's nominations persons who were members of the governor's party, but there have been numerous exceptions. All but one governor have appointed members of the opposing political party to the bench.

The real issue, however, is whether these men, without regard to party affiliation, are highly qualified. Under the Merit Plan, every potential nominee is carefully screened by a commission made up of both leading non-lawyer citizens and lawyers. When the governor receives the slate of nominees from which he must make his appointment, all of the nominees are highly qualified men. After the judge is appointed, he no longer is under any debt to any political party or group since he thereafter runs only against his record. Judges, then, are indeed taken out of politics by the Merit Plan.

Fiction: Judges appointed under the Merit Plan are "frozen in office" and so become arrogant and autocratic.

Fact: Experience shows that most judges selected under this plan do remain in office for life; however, the periodic re-election feature keeps the judges aware that they have a responsibility to the voters and to the litigants and lawyers who appear before them. Three Colorado judges and one Nebraska judge lost

retention elections in the November 1972 elections. Most responsible bar associations poll their members when particular judges are coming up for re-election, and the results are widely distributed for the benefit of the voters. Newspapers and other media also assist in reminding the judge of his duty.

A modern system of retirement and an effective and fair method of disciplining and removing judges are also needed to assure a competent bench. Many states have already provided for these problems and an even larger number of states are presently sponsoring proposals similar to the dramatically successful California commission plan for judicial discipline and removal.

Fiction: Elective judges are good enough.

Fact: Herbert Brownell, former Attorney General of the United States, once declared that the curse of the elective judiciary is not so much outright venality as mediocrity. He called these mediocre judges "gray mice" and said that a "pretty good" judge is like a "pretty good" egg—not good enough. Judge Samuel I. Rosenman, former special counsel to two Democratic presidents, stated at an annual meeting of the American Judicature Society in New York, that "in many—in far too many—instances, the benches of our courts in the United States are occupied by mediocrities—men of small talent, undistinguished in performance, technically deficient and inept." He called the Merit Plan "a better way to select judges."

Fiction: Judges don't like the Merit Plan.

Fact: This is true only if they don't understand it or are trying to avoid their job. Judges are no different than other human beings. They prefer the known to the unknown. Occasionally a judge will be against the Merit Plan because he prefers to spend his time and money playing the political game rather than on the hard job of judging. Such a judge may be against the plan because it forces him to work on the next case rather than on the next election.

Although the cost of re-election of a competent judge under the Merit Plan has gone up 67 per cent in the past few years, it is still not prohibitive since it consists only of an increase from six cents to ten cents for the stamp to mail his filing papers. This is the only campaign expense a judge under that plan must incur. There is no necessity for him to spend his time at political rallies or soliciting funds or taking a year off before the election to make so-called nonpolitical speeches about his own qualifications. All he has to do is go to his chambers and get on with his job of administering justice under law.

Fiction: It is sufficient to change the method of selection of supreme court justices and leave the trial judges as they are.

Fact: It is true that the finest legal minds in the state should be found on the supreme court bench. Their decisions affect the outcome of nearly every case in every court.

Something like 99 per cent of the judicial work, however, is finally disposed of in the trial courts. A court system that lavishes its attention on the appellate courts and ignores the trial courts is like the bakery that fusses over the wedding cake and neglects the ordinary loaf of bread, which is the main product of any bakery.

Careful selection and protection of tenure are important not only for the judges of the appellate courts and the circuit courts, but also for the judges of the county courts, the criminal courts of record, and, of course, courts like the Metropolitan Court of Dade County, Florida, which is already operating under a Merit Plan. So also, in the County Court of Denver, Colorado, the Municipal Court of Atlanta, Georgia, and trial courts in Allen, Venderburg, and Lake Counties, Indiana, has the nominative feature been used for judicial appointments.

Fiction: Only five of 114 counties in Missouri have adopted the plan, which shows that most people in Missouri are against it.

Fact: This is false. The plan applies to all of the justices of the state supreme court, the

three intermediate appellate courts, the trial courts of Jackson County (Kansas City), the city of St. Louis (which is not a county, and the counties of St. Louis, Clay, and Platte. Jackson County and St. Louis city account for 36 per cent of the circuit judges of the state, and these judges together do most of the trial work in the state.

There have been strenuous efforts to get the plan extended to other counties, but they have so far been blocked by political elements in the state legislature which have always resented a nonpolitical judiciary. The plan was originally submitted to the voters by initiative petition after the politically-minded legislature had refused to do so. The people of Missouri have voted on their plan three times, each time approving it by a larger majority than before.

Fiction: The "Merit Plan" has not been accepted outside of Missouri.

Fact: The adoption of the merit selection and tenure plan in Missouri came at the very start of the last world war, and that conflict delayed action by other states for just about a decade.

In 1950, however, Alabama adopted the nominating commission for the circuit court of Jefferson County, in which Birmingham is located. In 1956, Alaska adopted the entire plan for its supreme court and general trial courts. In 1958, Kansas adopted it for its supreme court. In 1962, Iowa and Nebraska adopted it for all state courts, and Illinois adopted the feature of tenure by noncompetitive election for all judges above the level of magistrate. California preceded Missouri with the elective features for its appellate courts.

In 1963, the voters of Dade (Miami) County Florida, approved it for selection of their metropolitan court judges. In 1964, the voters of Denver, Colorado, approved the plan for their county court judges. Mayor Lindsay of New York, like Mayor Wagner before him, has voluntarily created a nominating commission to provide candidates for his judicial appointments in New York City. In 1966, Colorado voters adopted merit selection via constitutional amendment, as did Wyoming voters in 1972. The District of Columbia Home Rule Act, signed into law by President Nixon on December 24, 1973, provides for merit selection of judges in that jurisdiction. Governors in Florida, Maryland and Pennsylvania have voluntarily set up nominating commissions to fill vacancies. When it is recognized that taking anything out of political control is bound to incur intense political opposition, it must be acknowledged that this is an impressive record of progress in the last few years.

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