Comments

JUDICIAL SELECTION AND TENURE - A MERIT SELECTION PLAN FOR ARIZONA?

PETER G. DUNN

Popular election of judges has been the subject of much criticism and extensive debate.[1] In recent years there has been a strong movement away from popular election and toward some form of merit selection. A distinguished member of the bench observed:

> A politician may make a good judge if he can stop being a politician after going on the bench; but it is a great handicap to good judicial work to have a system which tends to compel every judge to be a politician in order to remain a judge.[2]

This comment will examine the history of judicial selection in the United States, discuss the trends toward reform, and conclude with recommendations for changes in the Arizona judicial selection procedure. To achieve a truly modern and efficient court system in Arizona other matters affecting the judiciary such as removal procedures, mandatory retirement ages, and increased compensation need to be considered.[3] This comment will, however, be limited to a discussion of selection procedures.

---

[1] *E.g.*, Elliott, *Judicial Selection and Tenure*, 3 WAYNE L. REV. 175 (1957); Garwood, *Democracy & the Popular Election of Judges: An Argument*, 16 Sw. L.J. 216 (1962); Hall & Schroeder, *25 Years' Experience with Merit Judicial Selection in Missouri*, 44 TEXAS L. REV. 1088 (1966); Hunter, *25 Years under the Merit Selection Plan*, 39 FLA. B.J. 22 (1965); Hyde, *The Missouri Method of Choosing Judges*, 41 J. AM. JUD. SOC'Y 74 (1957); Keefe, *Judges & Politics: The Pennsylvania Plan of Judicial Selection*, 20 U. PITT. L. REV. 621 (1959); Martineau, *Selection and Tenure of Maryland Judges, An Explanation of a Proposal*, 23 MD. L. REV. 201 (1963); Martinez, *A Layman's View of Wyoming Judicial Selection*, 15 WYO. L. REV. 53 (1960); Moran, *Method of Selecting Judges*, 32 FLA. B.J. 471 (1958); Parker, *The Judicial Office in the United States*, 20 TENN. L. REV. 703 (1949); Uhlenhopp, *Judicial Reorganization in Iowa*, 44 IOWA L. REV. 6 (1958); Vanderbilt, *The Essentials of a Sound Judicial System*, 48 NW. U.L. REV. 1 (1953); Winters, *Selection of Judges — An Historical Introduction*, 44 TEXAS L. REV. 1081 (1966).

[2] Speech by Henry T. Lummus cited in Crowdus, *The Missouri Experience with Judicial Selection and Tenure*, 25 J.B.A. KAN. 147, 148 (1956).

[3] A resolution proposing a constitutional amendment was introduced in the Arizona House of Representatives in the twenty-eighth legislature, first regular session, but failed to reach the floor. The proposed amendment, in addition to setting up a merit selection system for judges, contains the following provisions:

(1) 10 year regular terms for supreme court justices.
(2) 6 year regular terms for superior court judges.
(3) Mandatory retirement for all judges of courts of record at the age of 70.
(4) Prohibition of all partisan political activity by judges.
(5) A Commission on Judicial Qualifications to investigate and initiate removal proceedings for judges guilty of misconduct.

HISTORICAL BACKGROUND

Originally in the United States, judges were appointed, not elected. The drafters of both the United States Constitution and the first state constitutions provided for executive appointment of the judiciary, subject to some type of check or control by a legislative body or council.[4] The first twenty-nine states entering the Union did so with an appointive judiciary.[5]

The trend toward universal suffrage as a part of popular democracy in the 1830's gave rise to a feeling that the people should elect all of their public officials, including judges.[6] In 1832, Mississippi became the first state with an entirely elective judiciary and New York followed in 1846. By 1860, 22 of the 34 states in the Union provided for partisan, popular election of judges.[7] From 1846 until the admission of Alaska in 1958, each new member of the Union entered with an elective judiciary.[8]

Beginning in the last half of the nineteenth century, dissatisfaction arose with the partisan selection of judges, and many states adopted nonpartisan methods of election. In a speech to the American Bar Association in 1913, William Howard Taft asserted that the nonpartisan ballot was a failure. He said that the system would further lower the quality of the judiciary by making it possible for unqualified persons, who could not get political party support, to run entirely on their own and get elected by means of aggressive campaigning.[9]

Arizona entered the Union when the nonpartisan election system was being instituted by a number of states. The system adopted in Arizona was a compromise which provided that judges be nominated in party primaries and run in the general election without party designation.[10] This system is still in effect in Arizona today.

---

[4] Allard & Winters, *Two Dozen Misconceptions about Judicial Selection and Tenure*, 48 J. AM. JUD. SOC'Y 138, 139 (1964).

[5] For a brief review of the history of judicial selection in the United States see Winters, *Selection of Judges — An Historical Introduction*, 44 TEXAS L. REV. 1081 (1966). For a more extensive survey see E. HAYNES, SELECTION & TENURE OF JUDGES 80-135.

[6] "The country was engulfed in a struggle for democracy, and this feeling of 'democracy' expressed itself directly in the desire of the people to elect their own judges for limited terms." Peltason, *The Missouri Plan for the Selection of Judges*, 20 U. OF MO. STUDIES 17 (1945). *See also* A. SCHLESINGER, THE AGE OF JACKSON, ch. XXV (1945).

[7] Elliott, *Judicial Selection & Tenure*, 3 WAYNE L. REV. 175 (1957).

[8] It is interesting to note that the two most recent additions to the Union entered with a non-elective judiciary. The Alaska system provides for selection by the executive from a list of qualified applicants compiled by a nominating commission while Hawaii operates under a straight executive appointment system.

[9] Taft, *The Selection and Tenure of Judges*, 38 A.B.A. REP. 418 (1913).

[10] ARIZ. CONST. art. 6, §§ 4, 12 (1960). There is no record of any debate in the Arizona Constitutional Convention as to whether judges should be appointed or elected.

RISE OF REFORM

The necessity for reform of the existing judicial selection procedures was set forth in a speech by Roscoe Pound in 1906:

> Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench.[11]

Seven years later, Albert Kales presented a plan in which judges would be selected on a merit basis rather than by popular vote. He proposed that appointment of judges be made by the Chief Justice of the state's highest court form a list submitted by a nominating commission.[12] This proposal has been the basis for all of the subsequent merit system efforts.

During the same year that Kales devised his merit plan, the American Judicature Society was founded for the purpose of encouraging efficiency in the administration of justice.[13] For the past 53 years, one of the Society's major projects has been to promote the adoption of a merit system of judicial selection in all states.

In 1934, California adopted its present plan whereby the governor initially appoints all appellate court judges subject to the approval of a judicial commission. A nominating commission is not included in the California process. Under the California system, appellate judges run for re-election solely on their record.[14]

The American Bar Association endorsed a merit selection plan in 1937.[15] A year later its committee on judicial selection and tenure emphasized the need for the merit selection plan by reporting that, "[W]ith the exception of some of the less populous communities, direct election of judges operates to destroy judicial independence and in

---

[11] Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 415 (1906).

[12] The plan is set forth in BULL. No. 6, AM. JUD. SOC'Y (1914).

[13] 1 J. AM. JUD. SOC'Y 3 (1917).

[14] CAL. CONST. art. 6, § 26. For a review of the California System, its history and manner of operation, see Smith, *The California Method of Selecting Judges*, 3 STAN. L. REV. 571 (1951).

[15] The text of the American Bar Association approved plan, 23 A.B.A.J. 102, 105, 108 (1937), is as follows:

> (a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.
> (b) If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the State Senate or other legislative body of appointments made through the dual agency suggested.
> (c) The appointee shall after a period of service be eligible for reappointment periodically thereafter, or go before the people upon his record with no opposing candidate, the people voting upon the question, "Shall Judge Blank be retained in office?"

consequence the bench is steadily retrograding, especially in metropolitan areas."[16]

In 1940, Missouri became the first state to adopt a merit selection system. The plan incorporated most of the provisions set forth by Albert Kales 27 years before.[17]

One of the major factors which led to this action was that political machines in St. Louis and Kansas City controlled judicial selection and tenure.[18] A party with the right lawyer could get a speedy trial before a sympathetic judge; otherwise, the case might be lost or delayed for several years.[19] Court dockets were congested since even the able and efficient judges had to spend much of their time campaigning and attending political functions. At one point, the judges in Kansas City refused to contribute the specified amount to the machine's campaign fund. In the next session of the legislature, their salaries were reduced by three times the amount of the requested campaign contribution.[20]

When the merit plan was submitted to the legislature, it made no headway. Concerned citizens formed a group and sponsored a statewide initiative campaign. The voters approved the proposition twice by overwhelming majorities.[21]

In 1958, Alaska adopted a plan similar to that of Missouri for its supreme court and general trial courts.[22] Kansas also adopted the plan for its supreme court in 1958.[23] The voters of Iowa and Nebraska approved the merit selection system for all state courts in 1962.[24] In the 1966 election, the voters of Colorado adopted the plan for all courts of general and limited jurisdiction.[25] Several other jurisdictions have adopted the system for their trial courts.[26]

---

[16] 24 A.B.A.J. 710 (1938).

[17] The only major change in the Missouri System is that final appointment is made by the governor rather than the chief justice as Kales proposed.

[18] Hyde, *The Missouri Method of Choosing Judges*, 41 J. AM. JUD. SOC'Y 74 (1957).

[19] Hall & Schroeder, *25 Years' Experience with Merit Judicial Selection in Missouri*, 44 TEXAS L. REV. 1088, 1093 (1966).

[20] *Id.*

[21] In the first election, the voters adopted the plan by a majority of 90,000 votes. Two years later, the Legislature submitted an amendment to repeal the plan and this amendment was defeated by 180,000 votes. *See* Bundschu, *The Missouri Non-Partisan Court Plan — Selection and Tenure of Judges*, 16 U. KAN. CITY L. REV. 55 (1948).

[22] ALAS. CONST. art. IV, §§ 5-8.

[23] KAN. CONST. art. 3, § 2(d)-(f).

[24] IOWA CONST. art. V, §§ 15-17; NEB. CONST. art. 5 § 21.

[25] 50 J. AM. JUD. SOC'Y 113 (1966).

[26] Nominating commissions are utilized in Jefferson County, (Birmingham) Alabama; Dade County, (Miami) Florida; and Denver County, Colorado. In addition several governors and mayors who are given power to select judges have voluntarily appointed nominating commissions to aid in the selection process.

THE PLAN

The Missouri Plan[27] has three basic elements: 1. Nomination of three candidates for a judicial vacancy by nonpartisan, lay-professional nominating commissions. 2. Appointment of the judge by the governor from the list submitted by the nominating commission. 3. Review of the appointment by the voters in elections in which the judges run unopposed solely on the question of their retention in office.

The nominating commission is the key to the Missouri Plan. Its purpose is not only to keep the governor from making bad selections, but to give him affirmative assistance in making good ones.[28] The commission is made up of an equal number of lawyers elected by the members of the bar and laymen appointed by the governor. The chief justice is a member and chairman of the commission. The terms of service on the commission are staggered, and no member is permitted to hold any official position in a political party.[29] Members, other than the chief judge, are limited to one six-year term on the commission.[30]

While the nominating commission reduces the likelihood of the appointment of unqualified individuals, the necessity of facing the electorate furnishes an effective means of correcting mistakes. It also tends to prevent judges from being arbitrary in carrying out their duties. Instead of running against a named opponent, the incumbent judge runs on the sole question, "Should Judge ..... of the ..... Court be retained in office? Yes or No."[31]

In Missouri the plan is mandatory for the appellate courts and for the trial courts of Jackson County (Kansas City) and the city of St. Louis.[32]

All evidence indicates that the plan is working well in Missouri and that the lawyers and general public do not wish to return to the old elective system.[33] A member of the Missouri Bar contends:

---

[27] The plan is also known as the "A.B.A. Plan," *see* note 15 *supra* and Uhlenhopp, *Judicial Reorganization in Iowa*, 44 IOWA L. REV. 6, 65 (1958); the "Kales Plan," *see* note 12 *supra;* and the "Non-Partisan Court Plan," *see* Peltason, *The Missouri Plan for the Selection of Judges*, 20 U. OF MO. STUDIES 42 (1945). In this comment the term "Missouri Plan" will be used.

[28] Winters, *Consensus of Judicial Selection Proposals*, 28 J. AM. JUD. SOC'Y 107 (1944).

[29] MO. CONST. art. 5, § 29(d).

[30] MO. SUP. CT. R. 10.01, 10.02, 10.03.

[31] MO. CONST. art. 5, § 29(c) 1.

[32] MO. CONST. art. 5, § 29(a). In most states which have adopted similar plans, there has been no limitation to the larger counties. The proposed Arizona Plan, see note 3 *supra*, would apply to all counties.

[33] In a survey conducted among a random sample of one-half of the members of the Missouri Bar, 61% favor the Plan, 16% prefer nonpartisan elections, 12% partisan elections, and 11% had other suggestions or no opinion. Watson, *Missouri Lawyers Evaluate the Merit Plan for Selection and Tenure of Judges*, 52 A.B.A.J. 539, 540 (1966).

> We now have a truly independent judiciary in Missouri and our litigants are actually receiving a higher quality of justice, and the confidence of the people has been restored in our courts. Our plan has encouraged men to serve on the bench who would not submit themselves to the ordeal of campaigning for office under the old political system or who lacked the means to finance such a campaign; and we now have better qualified men on the bench than we had under the old system, and this includes most of the incumbent judges at the time of the Plan's adoption, inasmuch as they no longer have to be politicians in order to remain on the bench. Further, the administration of justice has been speeded up in Missouri. From all angles the public, which always has the biggest stake in the Courts, has been substantially benefited by our new system.[34]

The Missouri Plan is said to incorporate the best features of both the appointive and elective systems. It gives reasonable assurance that the best available candidates will be selected because the initial selection is made by a group well equipped to determine the fitness of the applicants. The plan also allows the voters to subsequently unseat weak or incompetent judges.

It is generally agreed that the judiciary, to be effective, must be independent.[35] It is very difficult for any man to maintain this independence where he is elected for a short term and must appeal for support from those who are likely to have cases before him.[36]

Another reason for merit selection rather than election is that the characteristics which enable men to be good judges are not necessarily those characteristics which are impressive to the electorate in a short judicial campaign. Also, the number of attorneys who will give up a law practice for the electoral battlefield is limited. The Chief Justice of the Supreme Court of New Jersey, Arthur T. Vanderbilt, discussed this aspect of the problem as follows:

> [M]any desirable potential judges who would accept an appointment to the bench are disinclined to encounter the recurring hazards of a political campaign for election, and so the field of choice is unfortunately narrowed.[37]

Opponents of the Missouri Plan contend that it is "undemocratic" since it restricts the right of the people to select their own judges.[38]

---

[34] Crowdus, *The Missouri Experience with Judicial Selection and Tenure*, 25 J.B.A. KAN. 147, 154 (1956).

[35] ABA CANONS OF JUDICIAL ETHICS, No. 14: Independence.

> A judge should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.

[36] Parker, *The Judicial Office in the United States*, 20 TENN. L. REV. 703 (1949).

[37] Vanderbilt, *Impasses in Justice*, 1956 WASH. U.L.Q. 267, 275 (1956).

[38] Martineau, *Selection and Tenure of Maryland Judges, An Explanation of a Proposal*, 23 MD. L. REV. 201, 202 (1963); Moran, *Method of Selecting Judges*, 32 FLA. B.J. 471 (1958).

Control by the people is retained under the plan in several areas. The people elect the governor who makes the appointments, and the people pass final judgment on the judges by voting either to retain or remove them from office. While the people unquestionably have the right and the duty to select their policymakers (members of the legislative and executive branches), professional competence and the ability to preside impartially are the primary questions in the selection of a judge.

In Arizona, particularly in the larger counties, candidates for judge generally confine their campaigning to signs, billboards, and an occasional speech about the importance of courts to society. In most cases the voters are left to choose the most familiar name or the candidate who has spent the most money during the campaign.

In most states which elect judges, a majority of the judges originally reach the bench by interim appointment.[39] This amounts to one man judicial selection by gubernatorial appointment without the checks and balances found in a truly democratic system.[40]

Another argument voiced against the merit system is that it tends to freeze poor judges in office, that it is difficult if not impossible to remove a man from the bench in a noncompetitive election where he runs on his record. It is true that it is difficult to defeat an incumbent judge under the plan, although it has been done.[41] The emphasis of the Missouri Plan, however, is not on removing poor judges, but on keeping them off the bench in the first place. Dean Roscoe Pound in discussing this problem said, "Too much thought has been given to the matter of getting less qualified judges off the bench. The real remedy is not to put them on."[42] The Missouri Plan is in essence a compromise between the elective system with its insecurity of tenure and resulting loss of judicial independence and the life appointment system with its almost total security of tenure and resulting loss of accountability.

Another argument is that the merit selection plan gives the bar associations too great an influence in the selection of judges. The answer to this is that the nominating commission is made up equally of lawyers and laymen. Presumably the governor, who appoints the laymen under the plan, would appoint them with an eye toward giving representation to wide areas of the community. The lawyers have a high stake in the calibre of judges selected and should be well qualified to pass on the merits of the applicants. There is no indication that

[39] Just under 50% of Arizona judges originally reached the bench through appointment.
[40] Winters, *One-Man Judicial Selection*, 45 J. AM. JUD. SOC'Y 198 (1962).
[41] 48 J. AM. JUD. SOC'Y 124 (1965).
[42] Pound, *Introduction* to E. HAYNES, SELECTION & TENURE OF JUDGES at xiv.

any segment of the bar has been favored with judgeship appointments in those states which have adopted the Missouri plan.[43]

CONCLUSION

A leading attorney and former federal judge summarized the advantages of the Missouri Plan as follows:

> The benefits [of the Missouri Plan] are enormous. The plan provides a commission on which leading lawyers, who actually know the persons best fitted for judicial service, and laymen who are interested in the best administration of the laws, can cooperate, investigate, and present the governor a list of the top men available. The plan permits nomination of persons who, by scholarly nature or non-political leanings would never engage in the old type partisan campaign. Thus, it gives the governor a choice of the best.[44]

A judicial selection and tenure system should fulfill three requirements: (1) Selection in the first instance must be according to qualifications of professional competence. (2) Security of tenure for the qualified must be provided. (3) There must be adequate means of removing those who demonstrate unfitness for office.[45] The present Arizona system may fulfill the third of these requirements, but it clearly does not satisfy the first two.

Arizona should adopt a constitutional amendment providing for a merit plan similar to the Missouri Plan for the selection of judges of the Arizona Supreme Court, Arizona Court of Appeals, and the Arizona Superior Court. Adoption of such a plan would insure that the best qualified men would hold judicial office and would preserve the independence of those men once they ascend to the bench. A merit selection plan would raise the prestige of the judiciary and help insure the fair and impartial administration of justice.

---

[43] The charge is often raised that the corporate and personal-injury defense lawyers receive a disproportionately large share of judicial appointments under the Missouri Plan. There is no evidence to support this contention.

[44] Savage, *Justice for a New Era*, 49 J. AM. JUD. SOC'Y 47, 48 (1965).

[45] Wood, *Elements of Judicial Selection*, 24 A.B.A.J. 541 (1938).