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## THE SELECTION OF JUDGES\*

L. L. BOMBERGER†

It might be asked at the outset whether it is worth while to review in Indiana a book with this title. The question of judicial selection has been discussed for nearly half a century with no visible progress. It is time that the proponents and opponents of a change in the method of selection get on common ground and discuss the same thing. Time and again those favoring a non-political selection have stressed their objective to be the maintenance of capable judges in office. Their objection to political selection is not so much that men should not go into office with the party which nominates them, but that when that party, by the turn of the wheel of political fortune, which is never static, goes out of office, the judges must go with it. On the other hand, the opponents say that a man who is not good enough to be a member of one of the political parties is not fit to be a judge. There is no answer to that argument because it is so far from the point that it merits no discussion. Others insist upon holding the judges on party tickets because they make excellent leaders for weak or incompetent candidates for other offices. This motive, of course, is not publicly discussed, but its influence is not lost sight of in the private councils of political leaders.

The latest referendum of The Indiana State Bar Association, which was participated in by about half its membership, showed that 553 members favor a modification of the present system with 183 opposed to it. A vote of more than

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\* A review of Haynes, *The Selection and Tenure of Judges* (The Judicial Administration Series, 1944) pp. 308.

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3 to 1 in favor of any proposition should impress impartial observers with the merits of the cause. The State Bar Association caused a proposed constitutional amendment to be introduced in the General Assembly of 1945 which was entirely free from identification with any plan or proposal. It would merely have unshackled the General Assembly by placing in its hands power which it now lacks, that is, to provide a method of selection other than by a political ballot. It would give to the General Assembly power to classify counties with respect to population, or for other reasons, and afford relief from political selection in such centers as in its wisdom the General Assembly might determine were entitled to such relief. This resolution was defeated in the House by a vote of 77 to 7, while at the same time a constitutional amendment was proposed and adopted to meet the crying need of extending the term of county sheriffs from two to four years. Such is politics!

The author states in his preface that his purpose is to gather in one place the essential data bearing on the technique of judicial selection. He has accomplished this objective admirably. He adds the obvious, that the problem of how to select judges is of fundamental importance. Unfortunately, this fact is rarely given weight by the electors until a scandal occurs on the bench. Happily, however, from that standpoint, the interest in the subject is sporadic and unusual.

The introduction by Dean Pound is not only a guarantee of the merits of the book but is an essay of great value in itself, and no one interested in the subject of judicial selection should fail to read this comprehensive discussion with great care. He says what he and many others have repeatedly pointed out, that the whole subject of the administration of justice arises in part out of the encroachment of the administrative tribunals on judicial justice, and that we may expect this to continue unless the courts are made wholly adequate to a full and speedy, and not too expensive, an administration of justice. The judge in America, he says, is a figure of chief magnitude.

"It is of special moment to maintain the position and functions of the judiciary in our polity because law is under attack in a time of rising political absolutism throughout the world. Law, as distinguished from laws, calls for judges. A polity carried on according to law calls for judges of the highest order of character, ability, and professional competence."

Only such a judge can serve the ends of justice adequately. He decries the doctrine of the disappearance of law and of individual rights; that law is nothing but what officials do; that they are to stand for law to the citizen and the citizen be wholly subordinated to them. This, he says, is the doctrine of Continental Europe, and is called public law; that it is eating up the law which is in English-speaking lands in which official and private individuals stand on the same plane before the law, in which rights and liberties of the individual are curtailed by law enforceable in the courts, and in which the interests of one can be preferred to those of another only by rules of law. Official lawlessness is the most dangerous of all lawlessness. It invites anarchy and autocracy. Our philosophy has been to insist that those who administer the law are under the law. To maintain this means that judges must be independent, well trained, strong men and strong lawyers of experience and reason.

"A judge who is part of a political administration or part of an administrative hierarchy, or a partisan of anything but the law, is out of place in our constitutional regime."

He emphasizes the importance of responsibility on the part of those who choose judges, the necessity of their having competent knowledge or information as to the qualifications of those eligible for choice, and that the selecting agency must be one who fully appreciates the position and task of the judiciary in our polity. The public are likely not to appreciate or to undervalue the importance of continuity and length of judicial service. He says it is significant that the twelve outstanding judges in American judicial history each served at least a quarter of a century in a judicial office, and an examination of the biographies of the judges who have made their marks in our political history will show that length of services has been conspicuous in substantially all of them.

The Dean very pointedly says that 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. He has a word for the untried judge in that he remarks that he have abundant examples of judges, of whom little was expected when they went on the bench, giving, after a time, very general satisfaction and at times acquiring distinction. It is not a sound policy to assume that ease of getting judges

off the bench will enable us to assure having good judges on the bench.

The Dean lays particular stress on conditions in our urban industrial system and the unfortunate results flowing from the system of nomination of judges by direct primaries. Publicity is a political asset, whereas the opinion and criticism of the profession should be more important. Political judges are tempted not to offend litigants of strong political influence. Moreover, there is pressure to set up a bad system of rotation where there are many judges of co-ordinate jurisdiction. This nullifies the experience gained by a judge in a special type of case. Men are often nominated in primaries whom a convention would never have thought of naming, and no executive would have dared to choose. The strong independent lawyer on the bench who understands how to attain ends through the law is not afraid to do things which a mediocre judge with insecure tenure will not attempt. The Dean has come to the defense of judges who are criticized for what is termed their conservative attitude. He says that

“After all, judges must go with the main body, not with the advanced guard, and with the main body only when it has attained reasonably fixed and settled convictions. To confine the creative work of the courts within its constitutional and legal limits and yet be able to do that work wisely, at the right time, and in the right connections, calls for the strongest judges we can put and keep on the bench.”

Finally, he champions the courts generally in this language:

“In spite of the very general subjection of the bench to politics involved in an elective, short-term judiciary and direct primary in so many states, the bench, upon the whole, has been the soundest of our institutions.”

In his general survey of the problem, Mr. Haynes says that the chief factor in revolution is a feeling of injustice by the mass of the people; that it has almost always been the desire of people to have judges who could be trusted to judge justly and without fear or favor; that we are to look upon all the vast apparatus of government as having ultimately no other object or purpose but the distribution of justice. This reminds one of the declaration by Daniel Webster that “Justice is the chief business of mankind upon the earth.” All agree, the author says, that we want good judges. We agree

on the primary qualities that a good judge must have. We agree that we want that system of judicial selection and tenure that is most likely, taking the world as it is, to put men of the required qualifications on the bench and keep them there. The question that causes the difference of opinion concerning methods of selection is how far and in what way should judges be subject to popular control.

Chapter II is devoted to a discussion of the present state of affairs, with a table showing the method of selecting judges in all of the states and other jurisdictions. It is pointed out that all judges are elected by the people in twenty-one states, and all except some inferior court judges in fourteen others, and in the thirteen remaining, judges are appointed by the Governor with the consent of one or both bodies of the General Assembly, or of the Governor's council, or by election by the General Assembly. The California plan is noted by which the Governor appoints with the consent of the Commission. The Missouri plan is noteworthy in its departure from the conventional; it required a constitutional amendment to accomplish it. The principal judges are appointed by the Governor from among three persons nominated by a judicial commission. After twelve months of service, the names of the judges appear on a ballot unopposed, the question presented to the voters being merely whether they shall be retained in office. At the end of each term, this process is repeated. If the voters determine that a given judge shall not remain in office, his successor is chosen by the Governor and subject to the same twelve months' probationary service. This is a type of recall and Missouri voters used it in the case of one unfit judge.

Mr. Haynes calls attention to the apparent inconsistency in the general program in Indiana in that judges of the municipal court in Indiana are appointed by the Governor while all other judges are elected. He apparently does not know that this system of appointment has not proved to be perfectly satisfactory.

In a discussion of judges as candidates for non-judicial offices, the author speaks of the traditional opposition to such candidacy, except that in western states it is common for judges to run for Congress, thus requiring the maintenance of their political connections and activities "to the detriment of their position and state of mind as judges." All

the states permit a judge to be a candidate for any other judicial office. In twenty-eight states he may be a candidate for any office, in fourteen states, he is disqualified from being a candidate for a non-judicial office during the term for which he is chosen; in five states a judge must resign before becoming a candidate for a non-judicial office.

The range of judicial salaries is summarized and in courts of last resort runs from \$4,800 to \$25,000, and in trial courts from \$3,000 to \$25,000. This compares unfavorably with salaries in England, but is much higher than those on the Continent, although in large centers we spend much more for judges in proportion to population than is done in England. In thirty states the judicial salary may not be reduced during the term; in other states, there are varying degrees of protection to the judge with respect to his salary. The temptation of the opportunity to reduce salaries should not confront legislators, especially if they are dissatisfied with judicial decisions. There is an instance cited where for this reason the salaries of the judges of the Supreme Court were reduced to twenty-five cents per year.

The author cites the Federal Judiciary as the best evidence of the virtue and faults of the method of judicial selection of which it is typical. He says it is indisputable that the level of efficiency for morality of the actual operation of the Federal system is no better than any state could hope to equal; that the Presidential power of appointment and the Senatorial power of confirmation have come to be used largely for political purposes, at least with respect to courts below the Supreme Court. The power of appointment, it is revealed, is largely for practical purposes passed from the President to the Senators. But the President carries responsibility and whatever political aspects there are to the appointment of Federal judges, if there be no senator of his party in the state where the vacancy occurs, he refers to Congressmen or party-leaders of his own party in that state. Nevertheless, the author says, the system still operates more successfully than popular elections for terms of years. It may fairly be said that within the knowledge of living men Federal judges in Indiana have generally refrained from activity in party affairs, and have not infrequently appointed to offices within their disposal qualified persons of opposite political faith.

The appointment of Federal judges has not been immune from attack. For nearly one hundred forty years it has appeared in one form or another. In the last fifty-five years over forty amendments have been proposed providing for popular election of some or all Federal judges, and the majority of them provide for limited terms. Some would even make the justices of the Supreme Court elective. These proposals so far have received little or no consideration in Congress, but no one can predict when a popular demand may ripen into congressional action after it acquires sufficient momentum.

There is an interesting chapter on English judges under the Stuarts, and it is quite worth while to trace the development of the English system from complete subservience of the judges to the Crown to their entire independence acquired during the revolution of 1688. One of the reforms made by King William on assuming the throne in 1689 was non-interference with the judicial office and thereafter judges were appointed and served during good behavior.

The fourth chapter deals with changes that occurred in the American system of selection approximately between 1830 and 1850. He says:

“It has been the opinion of most of the world for a very long time that judges must be selected by some person or group capable of making an intelligent choice; that the exigencies of the judicial function require the judge to be free to perform his duties without fear of reprisal; and that this latter requirement is best fulfilled by giving the judge tenure of office during good behavior.”

The appointive system prevailed in the early days in Indiana. Judges were first appointed by the governor. However, when the constitution of 1850 was adopted, Indiana got in step with the popular movement that had been acquiring momentum for at least twenty years in the United States by which judges were subjected to popular election by the people. This was one manifestation of breaking down the power of despotic and autocratic governments. As usual, the pendulum swung from the one extreme of practically complete subjugation by the ruler over all the affairs of the state to complete independence with all power in the people. No discrimination was had between the judicial office and all others. One of the factors contributing to this was the

circumstance that this country was peopled largely by immigrants who were dissatisfied with the state of affairs in the land of their fathers and had sufficient enterprise and courage to take radical action. One manifestation of the change was in the method of adopting state constitutions. Usually they were conservative and only two of them had been submitted to the people, the others being adopted in convention, but after 1830 only two escaped approval at the polls before going into effect. The wave of democratic fervor that was sweeping over all the world tended in America to bring all public officers under direct popular control, the judges among the rest.

One of the points of irritation between Federal Courts and the populace was with respect to deciding disputes which involved what the states thought were their sovereign rights. In Georgia the legislature went so far as to make it a felony to attempt to enforce the judgment of the Supreme Court of the United States in *Chisholm v. Georgia*. A Pennsylvania legislature passed a resolution denying the Federal Court power to adjudicate a certain controversy and at one time the militia interfered with the United States marshal in serving process. These contests produced some of the seeds of secession that culminated in the Civil War. Although the immediate issue there was slavery, yet the fundamental theory of nullification had long been smoldering, not only in the south but in the north.

There was much opposition to the independence of the judiciary, Jefferson being among those who were most vocal in expressing it. He denied that a government was republican in which any branch was supreme. In this respect he changed his position after the decision of *Marbury v. Madison*. He thought the latter decision was a precedent which was also dangerous in that judges could nullify legislation.

This chapter contains a chronological table showing the method of judicial selection in each state from its admission to the last change. In Indiana, we stand upon the constitution adopted in 1851 except as to certain statutory courts thereafter created. In all of these, except the municipal courts in Indianapolis, the judges are elected by the people.

Chapters 5 and 6 are devoted to discussion of foreign systems, including the English system. In view of the attitude of the General Assembly at the session of 1945, it is

thought that it would be unavailing to go into a discussion of these systems. Certainly if experience in a number of our states is not convincing, it would be futile to relate here the practice in foreign countries.

Chapter 7 enters a controversial field by discussing the question of whether elected judges are more liberal. The theory of many of the proponents of the elective plan is that appointed judges, especially with long tenure, are too conservative. What we want is liberalism and plenty of it and, moreover, we want it right now, is the guiding principle of some of the most eloquent protagonists of the present system.

The theory that elective judges with short terms are more liberal is not supported in fact. First, those who oppose the appointing system must assume that no appointing agencies can be created which will avoid the appointment of men of partisan temperament whether radical, conservative or otherwise. When the appointing power is conservative, there is no guarantee of a bench more conservative than an elected bench would be. Federal judges during the past fifty years have a better record from the liberal point of view than that of their elected brethren in state courts, notwithstanding that the great majority of such Federal judges were appointed by conservative presidents and confirmed by conservative senates. Very rarely does a case touch a question of social policy that can be affected substantially by the judge who decides it. It is admitted that it is very difficult in large centers of population to get and keep an able corps of judges so long as the road to the bench is by way of popular election. More than one-third of our entire population lives in fifty metropolitan areas with populations from two hundred thousand upwards. In forty of these judges are popularly elected. It should be noted again that in Indiana in the only population center exceeding two hundred thousand, the municipal judges are appointed by the governor. This does not reach the field of general jurisdiction because that is occupied by the circuit court and probate and criminal courts. Regardless of how satisfactory an incumbent judge may have been to the lawyers who are best able to judge his qualifications, he has no chance as a candidate of a political party to escape the fate of that party. It is common knowledge that Marion County is not politically sure for either party. Probably it changes the political aspect of its office holders more fre-

quently than does any other county of comparable population. Invariably at intervals a good judge is lost because he is on the wrong ticket.

The author asserts that appointive courts have rarely construed constitutions as narrowly as have the elected courts of Indiana and other states he names. The circumstance that judges have been elected or appointed cannot be shown to have any appreciable direct bearing upon their decision of questions of constitutional policy. The conservatism of an able judge is an intellectual conservatism while that of his inferior is instinctive and to him what is novel appears to be dangerous. The intellectual judge, therefore, is more open to conviction and since he is on the average superior in ability to the elected one, he is somewhat more liberal. The author quotes Dean Pound to the effect that most of the illiberal decisions of which complaint was made at the beginning of the twentieth century were the work of popularly elected judges. The author cites cases from numerous states showing the conservatism of elected judges and among those are *Republic Iron and Steel Co. v. State*, 160 Ind. 379 (1903); *Toledo St. L. & W. R. Co. v. Long*, 169 Ind. 316 (1907). He includes the case of *Thomas v. City of Indianapolis*, 195 Ind. 440 (1924), upholding an ordinance prohibiting picketing. These decisions, of course, class among the ultra conservative in the light of social conditions at the present time.

The final chapter is devoted to retirement of judges. Most civilized countries in the world, including the United States government and twenty-five states, provide in one way or another, more or less adequately, for the compensated retirement of judges. Provisions for retirement are much more common among the older and wealthier states. Nine of the original thirteen have such provisions; likewise nine of the twelve most populous states. The states in this group which do not provide for retirement are Ohio, Texas and Indiana. It might be added that Indiana has a sure and effective system of retiring judges, it follows the election returns. The possibility of a judge's becoming stranded without clients in the midst of an active and strong bar has, undoubtedly, deterred more than one able lawyer from seeking a place on the bench.

The book contains an excellent compendium of proposals

that have been advocated from time to time by students of the subject. These are conveniently group as follows:

1. Appointment of Judges.
2. Election, including non-partisan elections.
3. Appointment by one agency from a list of candidates proposed by another.
4. Plans for recommending candidates to the people or an appointing power with authority to accept or reject.
5. Separate judicial conventions.
6. Unusual methods of confirmation.
7. Functions of the bar, including the bar primary.

This book is a valuable one, not only for reference but for the material it contains which may be used in support of efforts to improve the system in Indiana. The first step to be recommended is to continue the efforts to have the constitution amended to provide for legislative discretion and permitting flexibility. Every man interested in the welfare of the commonwealth should have a conviction on the question of judicial selection and should be more than passive in efforts to attain the most desirable plan. The question will never be disposed of until it has been settled correctly. Indiana political leaders as well as thinking lawyers should be willing to accept the concept that the judicial branch of the government is independent of politics. The judge sits in judgment, not in party councils. We should be reminded of the admonition of Robert S. Taylor, President of the Indiana State Bar Association, in addressing the annual meeting in 1900:

“The right to a supreme and independent judiciary is the right preservative of all rights. Without this no right is secure.”

