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# DEMOCRACY AND THE POPULAR ELECTION OF JUDGES: AN ARGUMENT†

by

W. St. John Garwood\*

## I. THE PROBLEM OF DEMOCRACY

PROBABLY closer than most ideals to the heart of the average citizen of the United States has long been that of popular education. The picture of Washington crossing the Delaware doubtless does not match in universality of appeal our mental image of a tattered young American president-to-be wearily reading law by the light of a frontier hearth. Yet, now that in this nation of "biggests," public education is evidently the biggest peaceful enterprise, we are suddenly jolted, by the intellectual progress of a proletarian oligarchy, into wondering whether our vast system is not more "popular" than it is educational.

Obviously the relatively popular or "democratic" quality of a given public program or institution is no certain criterion of its true value even to the many who obtain immediate benefits or recognition from that program. This is perhaps even more the case when the practice in question is one rather of means or method than of the essential object sought, *e.g.*, the old system of electing militia officers by vote of the rank and file as distinguished from the object of public defense, or the present Texas system of selecting judges by direct popular vote<sup>1</sup> as distinguished from the object of dispensing justice. Nevertheless, ever since Jefferson, Burr, Jackson, and their coreligionists "buried" the Federalists, the idea that government is, in a literal sense, "everybody's business" has progressively flowered, and probably without sufficient regard for the adage about "nobody's business." At least up until recently, our conflict with totalitarian nations has perhaps stimulated this confusion between, on the one hand, "democracy" in the classic sense and, on the other hand, the great objects of freedom, safety, order, prosperity, and so on.

One would think that just the opposite result would have at-

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<sup>1</sup> Tex. Const. art. V, §§ 2, 4, 6, 7, 28.

tended our metamorphosis from the simple kind of society we were in the time of Jefferson and Jackson to the complex and populous world power that we are today. We would expect that government would have become progressively more a matter of representation and less one of purportedly constant direct popular intervention in public affairs. Indeed, something like this *has* been the case with the great private businesses which have characterized our national growth and in which the corresponding millions of stockholders deliberately forego most prerogatives of ownership beyond reading decorative annual reports and periodically giving full proxies to management-selected nominees. Even in public affairs our supposedly less conservative cousins of Great Britain follow a practice roughly similar to that of corporate stockholders and thus, from time to time give a sort of general power of attorney to this or that political party subject to a later accounting of stewardship, including the selection of appropriate officials. However, the American citizen by and large votes directly (and often) upon individual candidates for office as individuals, and, whatever be the office involved, with a minimum of reliance upon party responsibility and a maximum upon how the individuals in question "look" or "perform" in that highly theatrical process we call a "campaign."

That voters John Doe and Richard Roe greatly want it that way is less than certain. In cases like the 1961 Texas special senatorial election, in which some seventy candidates were on the ballot for one United States senator, John or Richard might not unreasonably have considered the affair to be as boresome as it was ridiculous. The extraordinarily low degree of popular participation in the average American election, as compared to what happens in other self-governing nations and as compared to the diligent attention the average American gives to his private business or professional affairs, seems to evidence almost a distaste for the elective process as it now exists. As the "well informed" voter in a state like Texas ponders his huge Democratic primary ballot, grumbling over how little he knows even by hearsay about so many of the numerous candidates, he wonders what the problem must be for the thousands who are substantially less informed than he is.

On the other hand, John and Richard are not altogether immune to political oratory designed to arouse in particular instances jealousy of their broad political prerogatives. For a people with a history like ours, this is a not unnatural predisposition on any level. The stirring, if now sometimes embarrassingly "subversive," words of Jefferson, Tom Paine, and many other revolutionary publicists doubtless loom

large in our mass subconsciousness. This being so, human nature being what it is, and the mass being by definition the lower (and larger) level of even the most advanced society, it is easy up to a point to exalt or defeat either measures or men in the name of popular rights as against the privilege or authority of the few. In a "democracy" such as we have, the trend from "right" or "center" to "left" is thus probably more natural than the contrary. However, in times of crisis the "right" may often come quickly to power even in peaceful fashion, as it recently did in the erstwhile, highly democratic, individualistic nation of France.

Obviously to an intelligent people either extreme is suspect; and it speaks well for our own people that by and large its instinct seems to be against extremes, however definite our drift to the "left" over the decades. All extremes naturally carry the microbes of quick disintegration or explosive transformation into opposite extremes, as witness Batista and Castro, or the French Revolution and Napoleon I.<sup>3</sup>

Extremism to "right" or "left" is far from the only source of governmental upheaval or catastrophe, whatever form the latter may take. As in the case of President DeGaulle, many more or less dictatorial governments begin by a genuinely popular delegation of power inspired by disgust or despair over the incompetence or inefficiency of an existing democratic government. The author's fairly extended experience in Latin-America leads him to believe that at least a number of so-called dictatorships in that area have been due more to discontent among sensible people over an existing inefficient or corrupt government (often "democratic" in form) than to any "rightest" conspiracy to exalt the privileged few or "leftist" designs for "social justice."

Naturally the consideration of efficiency in government is relative like most considerations. Freedom-loving people do not ordinarily accept a given type of rule merely because it may appear to be more efficient or less inefficient than another. On the other hand, illustrated by the American Colonies abandonment of the Articles of Confederation in favor of the Constitution,<sup>3</sup> efficiency in the conduct of public affairs is a consideration as important as any other. Without it, other and seemingly more vital considerations, such as freedom or justice, sometimes prove illusory, since inefficiency, or the mere absence of high efficiency, can mean even the death of the common-

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<sup>3</sup> The communists, of course, have managed a sort of ambiguous extreme, *i.e.*, a grimly "rightist" or authoritarian rule, but in the name of, and with important characteristics of, the "left."

<sup>3</sup> In the promotion of the Constitution, incidentally, Jefferson had a minor and less than enthusiastic part.

wealth in question. In the management of any large governmental enterprise, whether it is the armed forces, judiciary, public finance, public schools, the postal service, or agriculture, inefficiency is at best only tolerable, at worst fatal, and presumptively always undesirable. On the other hand, efficiency is presumptively always desirable and actually so except when the price, in terms other than the normal ones of time, money, personnel, and quality of the immediate product, is clearly too high.

Most Americans would doubtless prefer to die than exist under a regime like that of Soviet Russia. Yet people are questioning whether foreign governments do not include the cream of their own national intelligence to a greater extent than our federal and state governments do. The answer most often given to that query is not comforting. For example, how many reasonably informed Texans would say that the most important Texas governmental body, *i.e.*, the Legislature, is composed of the cream of Texas intelligence? If the Governor's recent suggestion for stronger lobby-control legislation<sup>4</sup> is to be taken seriously, the answer could hardly be favorable to the Legislature. To be sure, under many circumstances, mediocrity in the public service is tolerable. However, due to the increasing complexity and difficulty of our governmental problems, mediocrity will no longer suffice and the need for persons of superior ability in governmental positions is greater now than ever before.

## II. THE MODERN ELECTION SYSTEM

It is impossible to prove, and thus somewhat hazardous to suggest, that any present relative inadequacy of our government to cope with modern complexities results from our elective system. However, many men experienced in the Texas political situation have indicated that the standards of public service have deteriorated since the adoption of the direct primary system.<sup>5</sup> It seems reasonable that to throw before a relatively indifferent and far from fully informed electorate a long list of candidates without even the endorsement of a particular candidate by the regular party organization, is not a very efficient method of selecting the most qualified public servants; although, if financial expensiveness were the equivalent of excellence, it would be the most efficient method on earth.<sup>6</sup>

Elections are increasingly a financial windfall for the news and

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<sup>4</sup> The suggestion was made in connection with the then pending sales tax legislation.

<sup>5</sup> For historical outline of Texas party primary system, see Dallas Morning News, Texas Almanac 474 (1961-1962).

<sup>6</sup> For an able discussion of this general topic, see *The Hughes Plan*, speech by Hon. Jesse Andrews, Proceedings of the Philosophical Society of Texas 5 (1958).

publicity media, as well as for the "public relations counsel." This is doubtless no evil in and of itself; but in a vast and populous state like Texas, the related, and very high, cost does raise the question of whether the "democratic" features of a system may not become so expensive as to render the system itself essentially undemocratic. The total cost of a "warm" gubernatorial race will easily run into the hundreds of thousands, and even a state-wide judicial race will sometimes reach a hundred thousand. The resulting indebtedness of the successful candidate—either to the bank in terms of money or to supporters in terms of gratitude for money contributed—is a hardly desirable condition from the standpoint of good government, particularly where the office in question, for example, a judgeship or membership on the Railroad Commission of Texas, is one involving frequent decisions by the holder between conflicting private interests. True, the availability of unlimited funds to a given candidate is no guarantee of his success, *e.g.*, the 1961 Texas senatorial election;<sup>7</sup> but few candidates nowadays win, or even expect to win, without considerable expenditures.<sup>8</sup>

On the national level and in the "two-party" states, there is, indeed, nominal party responsibility for both governmental personnel and measures. But on the whole this responsibility is more nominal than real and bears small resemblance to its counterpart in nations like the United Kingdom, however increasingly narrow the policy differences between the English parties may be. On the state level, as a rule, the primary, which selects the party candidate, is only another popular election into which anybody may throw his or her hat regardless of true qualifications for the office or reliable assurance of substantial voter support.<sup>9</sup> Moreover, in states like Texas, in which the Democratic Party is still little more than an inapt name for the bulk of the state electorate, the party primary is in most instances simply the final election.

The national party nomination and platform process is, of course, an animal of a different species, but, all things considered, of the same genus as the rest of the American system. General Eisenhower, a Republican, undoubtedly disappointed and even surprised the Democratic party by refusing to run under its banner. Often party

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<sup>7</sup> The winner, Senator John G. Tower, was a professor in a small college; his leading opponent was former Senator Wm. A. Blakely, oil man, capitalist, and philanthropist, generally reputed to be a multi-millionaire.

<sup>8</sup> See Proceedings, *supra* note 6, at 10.

<sup>9</sup> As a consequence, we have the silly phenomenon of "name" candidates, like the "Will Rogers" that appears from time to time on Oklahoma ballots or the otherwise anonymous Jeffersons, Jacksons, etc., who rarely win but sometimes do confuse the issue sufficiently to eliminate the best candidate.

discipline or principle plays little part in the choice of convention delegates, while the respective party platforms might as well be written on Madison Avenue, considering their insignificance in respect to definiteness, sincerity, or assistance to the individual voter in casting a worth-while ballot. In the selection of the candidates, subject, of course, to minimum standards of no great practical significance, if there be any important criterion that might be called objective or intellectual, it is that the nominees shall have individual voter-appeal of one kind or another, including ordinarily the theatrical talent for television performance. Actual experience in statesmanship or high politics is evidently no vital prerequisite, since our list of presidents includes so many with a military background.<sup>10</sup>

### III. ELECTION OF THE JUDICIARY

Much, although not all, of what has been said above with respect to our general elective system applies to the practice in Texas and a majority of the other American states in choosing their judiciary by direct popular vote. This system is contrary to the executive appointment system prevailing on the national level and (either in the usual or modified form) in some ten of our states,<sup>11</sup> contrary to the legislative election system of five states,<sup>12</sup> and, indeed, contrary to the methods of the rest of the civilized world,<sup>13</sup> including notably Great Britain.<sup>14</sup>

Even though there is greater party responsibility for the respective candidates in two-party states than in one-party states (such as Texas), the elective system is no more appropriate for judicial selection and tenure in the one case than in the other. Political parties being designed to win or lose elections as parties, there is always the possibility of carrying into or out of office the party candidates for all elective offices, notwithstanding the nature of the office or the

<sup>10</sup> It is a paradox of American politics that we have, on the one hand, maintained our early popular prejudice against a peace-time professional military establishment as being an encouragement to monarchy or tyranny, while on the other hand, we have repeatedly elected professional soldiers to our highest civil offices.

<sup>11</sup> Alaska, California, Delaware, Hawaii, Kansas, Maine, Massachusetts, Missouri, New Hampshire, and New Jersey.

<sup>12</sup> Connecticut, Rhode Island, South Carolina, Vermont, and Virginia. In at least some of these five states the system is, for practical purposes, one of executive appointment, subject to legislative confirmation.

<sup>13</sup> Dean E. Blythe Stason, *Judicial Selection Around the World*, 41 J. Am. Jud. Soc'y 134 (1958). See the views of the late Chief Justice, Arthur T. Vanderbilt, *Brief for a Better Court System*, N.Y. Times, May 5, 1957 (Magazine).

<sup>14</sup> See *Judicial Selection in England*, address of former Lord Chief Justice of England, Lord Goddard, National Conference on Judicial Selection and Court Administration, November 22, 1959; Hanbury, *English Courts of Law* (2d ed. 1953); Jackson, *The Machinery of Justice in England* (1960).

relative qualifications of the individual candidate. Paradoxically, since a party wins or loses because of the individuals who "head the ticket," and these are rarely the judicial candidates, our very disposition to vote for individuals, rather than for political parties as such, may frequently cause good judges to be voted out or poor judges to be voted in as a party matter. Indeed, in a presidential election year, the fate of state candidates for election or reelection to the judiciary often follows that of the candidate of the same party for the presidency of the United States. The same result follows, of course, even when the "party politics" involved happen to be less a matter of individual candidates for governor or president than of genuine differences between the parties on important public issues of the day. These issues rarely, if ever, have any bearing on whether the judicial candidates of party A are better or worse qualified to be judges than those of party B.<sup>15</sup>

Doubtless, there will be no great change in our elective system generally for sometime to come. It might well be as undesirable as it is unlikely for the states to return to the convention system that preceded the direct primary.<sup>16</sup> As to the judiciary, however, the existing direct election system is so plainly not a *sine qua non* of free government and so clearly an inferior method of selection, that reasonable reform, adequately presented, seems almost as likely of public acceptance as it is eminently desirable. Indeed, there is an obvious trend in that direction.<sup>17</sup>

Let it first be conceded that the existing system is quite tolerable in the sense that the justice dispensed by the elective judiciary is, with few exceptions, far from debased in any relevant respect.<sup>18</sup> However, this is far from conceding that the elective system should not be reformed—otherwise why have we gone to the trouble of

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<sup>15</sup> "I was elected in 1916 because Woodrow Wilson kept us out of war. I was defeated in 1920 because Woodrow Wilson did not keep us out of war. In both of the elections not more than five per cent of the voters knew I was on the ticket." (Statement of former Missouri Supreme Court judge, Fred L. Williams, 28 J. Am. Jud. Soc'y at 110 (1944)).

<sup>16</sup> It may be noted in passing, however, that even Texas has recently adopted some reforms, and will probably adopt others, which limit direct popular elections by the device of lengthening the terms of elective offices. *E.g.*, the Constitutional amendments of the past decade doubling terms of local and district offices. Tex. Const. art. XVI, §§ 64, 65. That such measures are in a real sense limitations is clear when one imagines the case of an elective term of say twenty-five years or life. This would make the office in question significantly different from an "elective office" as generally understood, since the latter includes the idea of frequent elections with a correspondingly more effective, or supposedly more effective, opportunity for popular control of the office in question.

<sup>17</sup> See notes 29-48 *infra* and accompanying text.

<sup>18</sup> The justice of our courts compares not altogether unfavorably with that of the federal courts or those of states having non-elective systems and quite favorably with that of the great majority of nations of the world; and it probably could continue as it is more or less indefinitely without vital harm to the states concerned. One might sum it up in a phrase like "very good."



recent (and not so recent) changes in so many other obviously not completely intolerable judicial and legal conditions and practices?<sup>19</sup> And why, in the federal area, has the organized bar demanded, and the executive department now recognized, a much stronger voice in the appointment of the federal judiciary?<sup>20</sup> On the other hand, the present Article undertakes no argument for a strictly appointive system, however wider its usage and whatever its advantages or defects in comparison with the direct election system. The thesis is maintained, however, that since there is at least one other existing state system, quite as consistent with our free institutions as the direct election system and much more likely than the latter to produce the optimum in a judiciary, it ought to be adopted much the same as from time to time other important reforms conducive to a better administration of justice are adopted.

That the existing elective system is not itself a principle of free government, or a necessary consequence or expression of any such principle, should be clear merely from the above mentioned fact that it is far from universal even among the states of the United States<sup>21</sup> and is universally non-existent in our own federal government and in other nations, with the exception of the so-called "Peoples' Courts" (lower courts) of Soviet Russia, which are purportedly elected by popular vote.<sup>22</sup> Even in Texas, the system has not always prevailed. The Constitution of the Republic of Texas provided for judicial selection by the Congress only, while the State Constitutions of

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<sup>19</sup> *E.g.*, combining courts of law and equity, transferring the matter of procedure from legislatures to courts with the corresponding revision of all the rules, establishing and developing the summary judgment and pre-trial practice, revising and expanding discovery procedure, experimenting with the institution of court administrators, providing for judicial retirement with pay and substantial increases in judicial salaries, creating the rather revolutionary institution of compulsory membership in the "State Bar," raising the standards of legal education and for admission to the bar, creating specialized courts in the criminal, domestic relations, and juvenile fields, organizing and conducting judicial councils, judicial conferences, and the thousand and one expert bar groups that work like beavers for the "better administration of justice."

<sup>20</sup> Executive appointments to the judiciary also play a far from unimportant part in elective-system states like Texas. The reason is that, in these states, the executive has the power to fill vacancies by appointment for at least part of the unexpired term of an incumbent, who goes out of office by reason of death, disability, resignation, or removal. The result is that the "elective" judiciary of these states ordinarily gets into office in the first instance by appointment rather than election and that a majority of the incumbent judges are thus in a sense appointive judges. The elective process comes into play, of course, at the end of the limited period for which the appointment is effective, *i.e.*, either at the end of the election year next following the appointment (as in Texas, *supra* note 1, at § 28) or at the end of the unexpired term of the previous incumbent (as in some other states). In either case, the appointee, if he desires to retain the office, must seek election in the ordinary way—either for a new and full term, or, as the case may be, for what is left of the unexpired term—and against those opponents who may seek to deny him further fruits of his appointment.

<sup>21</sup> *Supra* notes 11-14.

<sup>22</sup> *Supra* note 13.

1845 and 1861 provided only for appointment by the governor with advice and consent of two-thirds of the State Senate.<sup>23</sup> Even now the Texas judiciary is composed largely of those who originally came on the bench by gubernatorial appointment rather than by election.<sup>24</sup>

#### IV. THE MODERN TREND AND THE MISSOURI PLAN

While in recent years the general trend of American politics has been toward more wide popular prerogative in government, the trend regarding judicial selection has been in just the opposite direction and largely upon the initiative of the organized bar. In the five states using the conventional appointive system<sup>25</sup> and the five using legislative election,<sup>26</sup> there has evidently been no significant move toward modification. Considering that in these states there probably have been a substantial number of purely political or otherwise inappropriate selections made and that the local lawyers are doubtless as critical as lawyers generally of such selections, the inference would seem to be that the local bars either have deliberately refrained from attempting reform for fear of ending up with a direct election system or simply continue to believe that their particular system, whatever its deficiencies, is better than any other.

##### A. In States Other Than Texas

However, in the elective-system states, the situation seems rather the opposite. To the ten traditionally non-elective-system states<sup>27</sup> an additional five must be added, which have in one way or another rejected the usual elective system during recent years. The pattern was set in 1937, when the House of Delegates of the American Bar Association<sup>28</sup> by formal resolution<sup>29</sup> recognized that "in many states movements are under way to find acceptable substitutes for direct election of judges." This resolution had the stated purpose of

<sup>23</sup> 3 Tex. Const. 528, 552, 581; art. 4, § 9 (1836), art. 4, § 5 (1845), art. 4, § 5 (1861) (referring respectively to the relevant sections of art. IV of the three constitutions mentioned).

<sup>24</sup> *Supra* note 20.

<sup>25</sup> Delaware, Maine, Massachusetts, New Hampshire, and New Jersey.

<sup>26</sup> *Supra* note 12.

<sup>27</sup> *Supra* notes 25-26.

<sup>28</sup> Hereinafter generally referred to as ABA.

<sup>29</sup> *The American Bar Association Non-partisan Plan for Selection and Tenure of Judges*, Standing Comm. on Judicial Selection, Tenure, and Compensation, ABA Pamphlet 5 (1958); *The Improvement of the Administration of Justice*, Handbook, Judicial Administration Section, ABA 80 (1952 ed.). At the Midyear Meeting of the ABA House of Delegates in February 1962 (after the principal Article was written), the ABA adopted its Model Judicial Article for State Constitutions, which carries forward in practical form the principles of the 1937 Resolution. Copies of the Model Article are available at ABA Headquarters, Chicago.

"establishing methods of Judicial Selection that will be most conducive to the maintenance of a thoroughly qualified and independent judiciary and that will take the state judges out of politics as nearly as may be." The resolution recommended what is now known as the American Bar Association Plan or Missouri Plan,<sup>30</sup> which is a combination of the appointive and elective systems coupled with substantial improvements on both. It adopted the appointive-system feature of original selection by the chief executive, but modified it by limiting appointments to a list of persons selected by a broad-based, non-political commission of well-informed membership. Similarly it adopted the elective system, but only in the form of a periodical popular referendum on each appointee, as distinguished from an election between him and opposing contenders for the office. The referendum was to be held first after a probationary period of service (presumably brief) and thereafter at the end of each regular term of office. The ballot in each instance would read in substance "Shall Judge Blank be retained in office?" By thus eliminating the possibility of an elective "race" against the appointee-incumbent by one or more rival aspirants to the office, the tenure of the former is made relatively secure except as his own judicial deficiencies may themselves invite public disapproval.

Still earlier (1934) the State of California had abandoned her elective system with respect to appellate courts, switching to her present system of executive appointment, subject to confirmation by a commission consisting of the Chief Justice of the State Supreme Court, the presiding Justice of a district court of appeal and the Attorney General.<sup>31</sup>

In 1940 Missouri adopted in practical form what the ABA Plan had suggested in principle, applying it to her appellate courts and some of the more important courts of first instance, while leaving its application to the remaining trial courts to the option of the voters of each trial court area ("circuit") concerned.<sup>32</sup> The state rejected, a few years later, an effort to restore the old elective system

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<sup>30</sup> *Supra* note 29.

<sup>31</sup> See *Standing Comm. Rep.*, *supra* note 29, at 18; Cal. Const. art. VI, § 26.

<sup>32</sup> Mo. Const. art. V., § 29; *Standing Comm. Rep.*, *supra* note 29, at 6-9; *Handbook*, *supra* note 29, at 80; Hyde, *The Missouri Court Plan*, 18 *Bench & Bar of Minnesota* No. 1 (1960); Hemker, *Experience Under the Missouri Nonpartisan Court Plan*, 43 *J. Am. Jud. Soc'y* 159 (1960); Morehead, *Missouri Court Plan*, A series of articles on how Missouri gets and keeps able judges (1948) (reprinted from the *Dallas Morning News*); Ullenhopp, *Judicial Reorganization in Iowa*, 44 *Iowa L. Rev.* 6, 51 (1958). The mentioned articles are but a small fraction of the total number dealing primarily or secondarily with the ABA or "Missouri" Plan since its adoption. See bibliographical section of *Standing Comm. Rep.*, and *Handbook*, *supra* note 29. The regular term of office is twelve years for appellate courts and six years for circuit courts.

and, shortly thereafter, again affirmed the new system by incorporating it as part of a general revision of the constitution with the same exceptions above noted. Thus, the plan has come to be identified with Missouri perhaps more prominently than with the ABA.<sup>33</sup>

The constitution provides for separate nominating commissions called "Judicial Commissions" with the distinguishing self-explanatory titles of "Appellate" (for one) and "Circuit" for the rest. The first consists of seven members, including the Chief Justice of the supreme court as chairman, three lawyers and three laymen. One member of each of the two latter groups is allocated to each of the three geographical districts of the state corresponding to the three intermediate appellate courts of the state. All the laymen are appointed by the governor. The "Circuit" commissions are provided to correspond in number to the trial circuits which adopt the plan, but consist of only five members, including, as chairman, the presiding judge of the intermediate appellate court for the particular area, two lawyers of the circuit elected by its bar and two laymen thereof chosen by the governor. The terms of office of the commissioners and the procedural rules of the commissions, including those for election of the lawyer-members, are as made by the Supreme Court. The number of nominees to be submitted to the governor for each vacancy, trial or appellate, is fixed at three.

The initial or probationary term of office immediately following appointment is "a term ending December 31st following the next general election after the expiration of twelve months in the office." The regular or full term is, of course, much longer. At the general election last mentioned the question of whether the new appointee-incumbent shall remain in office for a regular term is submitted to popular vote (of the state or subdivision thereof according to the nature of the judgeship) "on a separate judicial ballot, without party designation, reading: 'Shall Judge — of the — Court be retained in office?'" If a majority favors retention, the appointee-incumbent has the office for an ensuing full term, at the end of which, if he shall have meanwhile certified his desire to continue in office, the same referendum is had with respect to an additional term. If on the other hand, the referendum is against retention of the appointee-incumbent, whether at the first or any later election, the office then becomes vacant, and the same selection-plus-referendum process is repeated. While there is no express provision against re-selection of a judge who has been rejected in a referendum, common sense suggests that any such occurrence would be rare, and the only

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<sup>33</sup> *But see* note 29 *supra*.

undesirable consequence would be to give the electorate a probably unwelcome chance to change its mind.

In 1950 Alabama made at least a small switch from its elective system to one of the ABA type in the Circuit Court of Jefferson County, which includes the City of Birmingham.<sup>34</sup>

In 1958 Kansas followed the example of Missouri, although limiting the new system to its supreme court and making somewhat different provisions as to the composition and selection of the nominating commission.<sup>35</sup>

Most interestingly, both Hawaii and Alaska have begun their respective state careers with systems other than that of popular election. Hawaii has the strictly appointive system pursuant to her constitution adopted in 1950 in anticipation of statehood,<sup>36</sup> while Alaska follows the ABA Plan pursuant to her constitution similarly adopted in 1956.<sup>37</sup> Of no less interest is the fact that Alaska makes the Plan applicable on both trial and appellate levels, with a single nominating commission (Judicial Council) composed of three lawyers selected by the governing body of the State Bar, three laymen appointed by the governor and the Chief Justice of the supreme court, who is ex-officio chairman.

In both Iowa and Nebraska, the legislatures have submitted to their respective electorates for the 1962 elections constitutional amendments in effect adopting the ABA Plan for both appellate and trial courts in lieu of the pre-existing direct election system.<sup>38</sup> In the highly important State of Illinois, the 1961 legislature has similarly submitted an amendment to the effect that an incumbent, trial or appellate, surviving his first ordeal by regular popular election shall thereafter go before the electorate only in the referendum fashion of Missouri, Kansas, and Alaska.<sup>39</sup> Several other elective-system states have proposals for a change following (in greater or less degree) the ABA Plan pending action of the respective state legislatures; in other states such proposals have been endorsed by the bars of the states concerned; and in still others the proposals are under intensive bar study.<sup>40</sup> It is noteworthy that none of these relatively recent changes or proposed changes calls for the strictly

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<sup>34</sup> *Standing Comm. Rep.*, *supra* note 29, at 19.

<sup>35</sup> *Ibid.*; Kan. Const. art. III, § 2; Mo. Rev. Stat. 20.119-20.138 (1959).

<sup>36</sup> See Quinn, 44 J. Am. Jud. Soc'y 86 (1960).

<sup>37</sup> Alaska Const. art. 4, §§ 5-9; Stewart, *A Model Judiciary For the 49th State*, 42 J. Am. Jud. Soc'y 54 (1958).

<sup>38</sup> S.J.R. 14, Iowa 59th Gen. Assembly; 44 J. Am. Jud. Soc'y, No. 12 (1961).

<sup>39</sup> 45 J. Am. Jud. Soc'y 75 (1961); H.J.R. 39, 72 Ill. Gen. Assembly, §§ 10-11.

<sup>40</sup> E.g., Nevada, Ohio, Oklahoma, and Pennsylvania.

appointive or legislative election systems;<sup>41</sup> although there appears to have been no significant move for changing either system in those states in which it exists.

### B. *In Texas*

In Texas the subject has been under more or less constant consideration by the bar and other interested bodies for at least the past decade.<sup>42</sup> As recently as July 5, 1961, the statutory judicial advisory body known as the Texas Civil Judicial Council reendorsed adoption of an ABA-type plan by a vote of 8 to 2.<sup>43</sup> In 1949 a vote of the membership of the State Bar on the single question of the desirability of adopting an ABA-type plan for the appellate courts resulted in a majority of slightly over two to one (of the ballots cast) in favor of adoption; however, approximately one-half of the total membership abstained from voting.<sup>44</sup> Several years later the question was again voted on, although not as an independent proposition as in 1949, but as merely one part of a suggested "re-write" of the entire judiciary article. This proposed amendment contained many drastic reforms, such as combining the existing supreme court and court of criminal appeals and in effect putting the whole state judicial system, including the creation and abolition of lower courts, under the control of the supreme court.<sup>45</sup> As might have been expected, such a broad project drew opposition to many of its component parts and, although approved upon a first submission by a large majority of the votes cast,<sup>46</sup> was, on resubmission, defeated by a still larger majority; however, in both instances only about half of the bar voted.<sup>47</sup> Since the opposition included specific objection to the ABA Plan portion of the proposal (particularly on the part of one or two former leading bar officers), the vote has been quite erroneously interpreted by some as a deliberate reversal of the 1949 bar position on that subject. Doubtless many lawyers who had supported the 1949 proposition and continued to be advocates of the ABA Plan, voted against the later and broader proposal for reasons

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<sup>41</sup> Hawaii did not have the elective system prior to 1950. The 1934 California system is not a "strictly" appointive one.

<sup>42</sup> For a detailed account of these developments, including references to the corresponding reports in 11-22 Tex. B.J. see Garwood, Jr., *Recent Trends in Texas Concerning Selection and Election of Judges of the State, Trial and Appellate Courts*, Report to the ABA Advisory Comm. on Judicial Selection, Tenure, and Compensation (1960).

<sup>43</sup> Minutes of the Council. As to its previous steps in favor of the Plan see Garwood, Jr., *supra* note 42.

<sup>44</sup> Garwood, Jr., *supra* note 42, at 3; see 12 Tex. B.J. 152, 183-84 (1949).

<sup>45</sup> Garwood, Jr., *supra* note 42, at 4-7; see 16 Tex. B.J. 12-13, 36-44 (1953).

<sup>46</sup> Garwood, Jr., *supra* note 42, at 5; see 16 Tex. B.J. 181 (1953).

<sup>47</sup> Garwood, Jr., *supra* note 42, at 7; see 18 Tex. B.J. 16, 65 (1955).

quite unrelated to the matter of judicial selection.<sup>48</sup> Certainly that was the case with this writer.

#### V. THE NEED FOR A "QUALITY" JUDICIARY

Highly relevant to the matter of relationship between democracy and judicial selection is the fact that judges of today, and even more so of tomorrow, should not be merely "good lawyers" of high character, humanity, judgment, and industry, but also legal technicians of a definitely superior order. Contrary to popular impression, this is probably as true of the trial bench as of the appellate. Even in such familiar fields as the prosecution of ordinary crimes and suits over personal injury, modern litigation seems, for a variety of reasons, to be ever more complex and extended, with the consequences of error correspondingly graver in the delay and expense incident to new trials. In other and more traditionally difficult areas, such as anti-trust (civil and criminal), patents, unfair competition, labor disputes, public utility regulation, water rights, taxation, and conflict of laws, the demands in many instances on the professional competence of the judges, trial and appellate, can be described as close to appalling. Naturally the less skilled the judge, the slower and (to him as well as the others concerned) the greater nervous and physical strain caused by such cases, which are evidently increasing in number as well as in complexity and length. The expensive remedy of creating new judgeships, while, of course, necessary in many situations, is relatively less effective than that of improving judicial quality.

The judge's equipment, like his task, is different from that of a chief executive, national or state. The latter need not—indeed, probably should not—be a technician, unless in an incidental sense. The judge is also much more of a technician than the legislator. The judge is in fact less akin to the political executive and legislator than he is to the medical doctor, engineer, professor, military leader, or scientist. He must be, in the higher sense, an expert.

There is little more "democratic" necessity to choose a public expert called a judge by direct popular election, open to all comers having the minimum or formal requirements, than there is so to choose another kind of expert such as an admiral or university president. In these latter instances few would favor choice by election. The fact that an unsuccessful university president may be more readily removed than a judge, or an admiral more readily put

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<sup>48</sup> Stayton & Carroll, 33 *Texas L. Rev.* 987 (1955).

out of harmful circulation, makes little difference from the standpoint of democracy, since the voters can only remove even an elective judge at the end of his term. A desirable type of reform of the elective system such as the Missouri or ABA Plan will preserve this power, while at the same time eliminating popular selection of successor-judges.

The basic argument for reform of the present elective system must be, of course, that the reform will improve the administration of justice through the recruitment of better qualified judges and through the more undivided attention of judges to their work. The fact that the reform will make life happier for judges or be more consistent with the dignity of their office than the existing system, is relevant only insofar as these factors may produce greater judicial efficiency.

#### A. *Security Of Tenure*

Assuming an elective judiciary composed of the same individuals composing it today, a reform that would remove its presently unavoidable preoccupation with the matter of reelection would probably produce at least some enhancement of performance, both through improved morale and by affording more time and undistracted attention for strictly judicial work. Within limits, security of tenure is a more important consideration with a judge than salary or similar benefits, and this from the standpoint of honor as well as economics. The honor of occupying the office makes defeat, or the prospect of defeat, for reelection correspondingly more bitter. Defeat when seeking judicial office for the first time or when seeking advancement from lower to higher judicial office, or even in an election shortly following one's appointment to fill a vacancy, is tolerable. But defeat following an elective term or longer incumbency involves much more than the economic and professional readjustment for a new start in life, however serious a problem the latter ordinarily must be. The defeated incumbent will probably never be free of the thought that many will regard him, and not entirely without reason, as one who had been tried and found wanting by his fellow citizens in a task, for which character, learning, and industry, rather than the vicissitudes of politics, are supposed to be determinative.

The incumbent realizes, of course, that his chances for reelection are good; that the lawyers, who naturally will be the ones to follow his career with the most interest, are on the whole tolerant and reluctant to disturb judicial continuity, and, therefore, likely to favor a reasonably satisfactory incumbent when challenged for re-



election. But he also realizes that the ordinary voter, as distinguished from those of a higher economic or intellectual level, does not usually know or understand lawyers and is thus far from certain to know or heed their views about judicial candidates.<sup>49</sup> The lawyers themselves, already preoccupied with the burdens of practice and called on (at least in states like Texas) every two years for political (including financial) assistance to judges of every level, may not always "get around to" giving as much help as is needed or, being human, might not relish undertaking the incumbent's cause against a politically strong opponent. The incumbent also realizes that there are always a few lawyers, who find it impossible to accept certain decisions with merely the usual amount of "cussing the court," and accordingly are not loath to chastize the offending jurist in one way or another. The most serious retaliation is the threat, support, or actual production of, an opponent at the next election.<sup>50</sup>

The incumbent also knows that in a state with some fourteen thousand lawyers and more than four hundred judges above the level of justice of the peace,<sup>51</sup> opponents can and do arise for a variety of reasons, including the belief that they can do a better job than the incumbent or perhaps merely a natural ambition for personal advancement. Now that judicial salaries are at a relatively attractive level, with modern quarters, books, and secretarial help furnished free as well as retirement benefits, it is remarkable that incumbents are not more often opposed than they are. Considering how very little the average voter knows or can conveniently learn about the judiciary, its personnel, and qualifications and the further fact that the best judges are so often anything but the ablest politicians, an incumbent can readily think of any number of potential opponents, who, while not particularly well known as lawyers, are well known and skillful politicians and thus could probably displace almost any incumbent they might decide to oppose.

Not many years ago, the incumbent Chief Justice of the supreme court of a southwestern state had shortly before been appointed

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<sup>49</sup> Indeed, in Texas "races," a candidate who enjoys relatively little bar support usually (and not ineffectively) attacks his more favored opponent as being the candidate of a "clique" that would arbitrarily substitute its own choice for that of "the people."

<sup>50</sup> Strangely enough, in the case of appellate courts, the offending jurist is usually taken to be the one who was unlucky enough to have to write the offending opinion, although every lawyer knows that the writer is no more to blame than his colleagues on whose behalf the opinion was written. One somewhat cynical veteran of a Texas appellate court used to warn his younger brethren frequently that: "The longer you stay here, the more people you will hurt; and the ones you hurt will remember you much better than the ones you help!"

<sup>51</sup> Includes 47 appellate judges (9 supreme court, 5 court of criminal appeals, 33 court of civil appeals), approximately 160 district judges, and at least 260 county judges, judges of county courts of law, special probate courts, and special domestic relations courts.

to that office upon the death of his predecessor. Although probably more widely and favorably known in the state than any other judge, he was opposed in the ensuing democratic primary by a "volunteer" candidate from one of the larger cities. The volunteer was some seventy years of age; his career was notable largely for a suspension from practice for six months for unprofessional and other misconduct found by a jury of his own fellow townsmen and affirmed by the appellate courts!<sup>52</sup> However, in the same city there was a lawyer of excellent reputation, who happened to have the same surname as the opponent. Whether because of popular confusion over the names or otherwise, the once-suspended opponent carried the populous county in question by a conspicuous majority. Moreover, he came within a few hundred votes of carrying a still more metropolitan county immediately adjoining the first, receiving throughout the state a total of several hundred thousand votes, although fortunately well below a majority.

#### B. *Political Preoccupation*

A few months before the Texas 1948 democratic primary, this writer was appointed to fill a vacancy in an associate justiceship of the state supreme court. In that primary, about two-thirds of the counties of the state (and almost the election itself) were lost to a last-minute opponent, who was then literally unknown to three-fourths of the bar of the very city in which he lived and probably to nine-tenths of the bar of the state. However, he did enjoy a superior "political name" and over the years had had it twice on the ballot (although without success) for state offices not primarily concerned with the law.

Thus the incumbent knows he must be, or make an effort to be, a successful politician in addition to being a good judge, however difficult or distasteful the double task. He thus accepts the sound judicial axiom that "any opponent is a dangerous opponent" and, with greater or less diligence, tries in the usual ways of "politics" to head off opposition and accumulate enough political strength to defeat it if and when it may occur. This is rather difficult, considering that there is not a great deal about which judges may properly talk that will interest the average layman, unless they invade alien fields of political and social issues, which itself is often inappropriate and still more often risky. So judicial "politicking" is, to a considerable degree, a matter of participating in the gatherings and other activi-

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<sup>52</sup> Rowland v. State, 55 S.W.2d 133 (Tex. Civ. App. 1932—Fort Worth) *error dismiss.*

ties of the bar, although the latter is already pretty well informed about the qualifications of the "politicker" in question.

Of course, methods differ with particular judges. This writer recalls one incumbent candidate (seeking a much higher post) with whom he flew on the same commercial plane to attend a West Texas bar meeting. In the hour or so elapsing between departure of the plane and entry into the limousine at the destination, the candidate had managed to see that at least everybody on the plane heard his name and the details of his candidacy and had passed out cards to a dozen or more people! In another instance, a distinguished appellate judge, who had weathered rather vigorous opposition in the election following his appointment, prudently decided to forestall any similar inconvenience in future. Accordingly, during the year preceding his next election year, he visited in person all but a handful of the two hundred and fifty-four counties of Texas (including naturally an even larger number of cities!), calling on the lawyers, newspaper editors, bankers, merchants, sheriffs, county judges, and political leaders, whose recollection of his name and status might be politically helpful. At the same time this peripatetic jurist somehow managed to keep up with his heavy judicial work. If the effort did turn his hair a shade nearer white than it was before, this was probably healthier than the strain of waiting for the worst to happen, and thus perhaps at the last minute having to rush around trying to perfect a campaign organization, "tapping" unfortunate lawyer victims to act as campaign leaders or donate the "long green" so essential to our present democratic process!

This political preoccupation, if not excessively wasteful in point of time or distraction, is quite possibly so in other ways. For example, during the relatively short period of eleven years in which this writer served on the Supreme Court of Texas, the "turnover" among his eight brethren was such that when he left office he was senior in length of service to all of them except the then Chief Justice. Of the various ones who left the court during that period at least half were in their prime as jurists of excellence and left of their own volition. True, it cannot be proved that they left because of insecurity of tenure, since important steps in life are generally taken because of a combination of considerations. However, there is little doubt that the thought of insecurity had its effect. An offer of higher financial rewards elsewhere, for example, is far more tempting to an elective judge with a poor political name than it is to a life-appointee on the federal bench. The hazards to tenure being what they are, an able incumbent, tempted from the bench by one consideration or another,

ordinarily feels no great sense of obligation to serve out the term to which he was elected, still less to stand for reelection at the end of his term. If it is said that a good judge should feel sufficiently sure of reelection in any event, at least one answer is: how does any judge know "how good" he is or how good even the bar, still less the public, thinks he is? The occasional congratulatory letter from a lawyer who happens to agree with a particular opinion is no more solid a basis of self-evaluation than the somewhat less occasional protest from those who disagree. Conceivably a few opinions may, on reflection, convince the author himself of his unfitness; but of how many of his own opinions can a forthright judge say, "This clearly entitles me to the respect of both bar and public, including reelection whenever sought?"

### C. *Discouraging New Talent*

However important the political angle of an elective judicial system in its effect on incumbents, it is much more serious with regard to the lawyers who may or may not come to succeed them, *i.e.*, with regard to the caliber of lawyers who will be attracted to the judicial career. All of the above described worries and doubts, which so disturb incumbents, particularly insecurity of tenure, are also present, if less vividly so, in the minds of potential future judges.

That the elective state bench is less attractive to superior legal talent than the federal bench can hardly be questioned. It is rare when the competition for a federal vacancy does not include several lawyers worthy of the term "excellent"; and it is common knowledge that Texas state judges openly seek transfer to the federal bench when they think they have even a small chance to get it. The life term is probably the main consideration, because state judicial salaries and perquisites are rapidly approaching par with the federal. But a life term is only secure tenure—freedom from the hazards and distractions incident to the prospect of periodical elective opposition. Probably even life tenure would not be attractive enough to outstanding talent if it entailed original choice by popular election, since that is notoriously the field of the politician. Thus, the unpolitically minded lawyer, who is doing very well in practice or teaching will not readily throw his hat into a ring that resembles a public hat-rack, for he knows that in such cases the most qualified candidate is all too often "lost in the shuffle."

This seems to be a sound reason against attempting to improve the elective system by merely lengthening the elective term. True, lawyers have been much more sensible about scrambling for judge-

ships than people generally are about scrambling for offices like United States Senator or Governor; but a long term, with no effective "screening" process, might well cause even lawyers to scramble. Since an extension of terms is merely a less obvious device for limiting popular selection of public officers, a more complete and direct kind of reform should be preferable as applied to a professional arm of government such as the judiciary.

In actual practice, the beneficial effect of greater security of tenure is reasonably evident. While the federal appointive system shares the obvious defects of all strictly appointive systems, few will assert that it or the similar system of states like Massachusetts produces less sound or expeditious justice than does the prevailing elective system. On the contrary, many will agree with this writer's view that the former is, on the whole, more efficient than the latter.

In England, the principal judges (trial and appellate) are appointed for life either by, or with the intervention of, the Lord Chancellor, who is a sort of executive head of the judiciary and himself always an outstanding jurist.<sup>53</sup> A judgeship there is regarded as the crowning event of a successful career at the bar, and the quality of the judiciary is accordingly higher than most, if not all, of the other nations of the world. While its efficiency, relative to our own judiciary, would not be easy to analyze, its reputation for both fairness, speed, and a desirably high level of dignity is admittedly outstanding. From the writer's personal experience with English judges in action, this reputation seems far from exaggerated. Although factors like our own greater geographical size, complexity of laws and government, far greater employment of the jury system and doubtless much larger per capita volume of litigation, undoubtedly have important bearing on the difference in the number of judges required in each country, that difference is still so great that it suggests less efficiency in the American judiciary. Texas alone has more judges (above the level of Justice of the Peace) than England, although Texas has less than one-fifth as great a population. It is suggested that superior judicial ability coupled with a somewhat greater judicial independence incident to a proper system of judicial selection and tenure, is the most effective avenue to more efficient justice. The respect and authority accorded the English judges in their conduct of trials would probably not long subsist, unless the judges were intellectually worthy of it—unless, indeed, they were, by and large, professionally superior to the bar. A trial before a judge who is definitely less able than contesting counsel, and thus likely to be

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<sup>53</sup> *Supra* note 14.

also aware of that fact, can hardly be as expeditious or "just" as under the reverse condition. "Good judges can after a fashion make even an inadequate system of substantive law achieve justice. On the other hand, judges who lack these qualifications will defeat the best system of substantive and procedural law imaginable. The method of selecting judges is crucial."<sup>54</sup>

#### D. *Delay On The Docket*

Much of the alleged delay and overcrowding of metropolitan courts, with its corollary demand for more and more metropolitan judges, could be eliminated by the right judges with the right degree of authority, because much of the overcrowding and confusion is due to lawyers themselves and the reluctance of elective judges to take the necessary corrective measures. Obviously two inexperienced judges will not properly dispose of twice the amount of litigation disposed of by one expert. This is borne out by the fact that the relatively greater speed of English justice is in spite of a relatively smaller bench.

All this leads to a basic question which seems to this writer to underlie the main objection voiced by Texas lawyers to reform of the elective system: "Conceding for argument that a different system would produce a more expert judiciary, the latter would still be less desirable than what we have now!" In the discussion of the general subject at the July 1961 meeting of the Texas Civil Judicial Council, one member, who happens also to be the chairman of the Judiciary Committee of the House of Representatives of the Texas legislature, said more or less this: "The present system furnishes a more desirable cross section than will another." A former president of the State Bar of Texas seems to have had somewhat the same thing in mind when he said to the writer substantially this: "I'm against any change that will make our state judges more like federal judges." And while the present Article was being written, the writer heard this comment from yet another prominent Texas lawyer: "I used to think like you did until I happened to have a case before federal judge X, and that cured me."

So far as the "federal judge bogey" goes, it seems largely unsound in point of fact, as one runs over the list of Texas federal judges. The point evidently is, not that the judge displays the least bias or incompetence in his proceedings, but that his manner and methods suggest the poet's biting phrase, "Drest in a little brief authority." Those federal judges who may thus "make the angels weep"

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<sup>54</sup> Vanderbilt, *Brief for a Better Court System*, *supra* note 13.

(along with their own more sensible colleagues) are happily no more numerous than the few state court judges one encounters in a lifetime who were equally "peculiar," and for perhaps less defensible purpose.

The air of relatively greater dignity usually prevailing in the federal courts can hardly amount to harmful restraint on the freedom or intellectual ease of competent counsel. Indeed, this writer, after judicially reviewing the rather extraordinary number of complaints of conduct of counsel that, in his time, came before the Supreme Court of Texas from state trial courts, believes that the latter might well imitate the example of the federal courts in the interest of better justice and public respect for law. The lack of familiarity on the part of the average lawyer with the detail of federal court procedure—an unfortunate consequence of our complicated duality of court systems—doubtless contributes to lawyer attitudes of the kind above described, although quite illogically so.

Certainly there is small reason to deduce virtues in the elective system from the judicial excesses, if any, which one hears nowadays charged against sundry members of the federal Supreme Court. For all the clamor in the latter connection, no one seems to advocate for that court a system of direct popular election, whether for a limited or unlimited term.<sup>55</sup> Although it is impossible to demonstrate, one strongly suspects that those who cling to the election system for state court judges are as a group largely defenders of the appointive federal Supreme Court judges presently under attack.

If what is meant by phrases like "desirable cross section" in connection with the existing elective system is not the same old irritation of particular lawyers over the idiosyncrasies of an occasional federal judge, the implication probably is that judges under a non-direct-election system would be undesirably more "conservative." Indeed, the latter term is sometimes employed in argument against reform by lawyers who habitually represent personal injury claimants and, as a group, probably favor retention of the present system. This may also be true of the group habitually representing the labor side of labor litigation, although the writer is less sure of the attitude of this latter group.

If it is thus meant that judges, under a less "popular" selection and tenure system, would probably be biased or hostile to personal injury claims or to the position of organized labor and would ac-

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<sup>55</sup> After the principal Article was written, a candidate for the Republican nomination for the governorship of Texas *did* advocate such a system as part of his platform in the primary elections. He was soundly defeated.

cordingly cause cases to be decided against them which, under the existing system, would go the other way, it is difficult to see what factual or theoretical considerations support such a view. If there is any evidence or general impression that the federal courts are hostile to the classes of litigants in question, this writer has to confess ignorance of it. Nor, so far as he knows, has there ever been a serious assertion that the English judges are "conservative." Indeed, the latter try all personal injury claims without intervention of a jury and evidently without complaint of that practice on the part of plaintiffs. Certainly it would approach sheer fancy or prejudice to say that bias, extremism, intellectual hauteur, or whatever unjudicial quality may be meant by the "desirable cross section" argument, is a necessary or even frequent consequence of superior legal ability on the part of a judge. Particularly under the ABA or Missouri Plan, there is little reason to anticipate that judges selected otherwise than by popular election, will come from sources "slanted" against personal injury claims, the rights of organized labor or, for that matter, any other class of suits, defenses, litigants, or lawyers. Actually, if we are to think in terms of judicial "slant" or bias, the importance of money in the elective process would seem relevant—and the ready money sources are not personal injury claimants, labor, or that somewhat hypothetical creature called "the common man."

## VI. CONCLUSION

The reform advocated by this Article is the ABA Plan as it is applied in Alaska rather than in Missouri and Kansas. It is unfortunate that the two latter, having gone as far as they did, should have stopped where they did. Most jurists will admit that the trial judge is no less important than the appellate judge in our scheme of justice, even as the facts are no less important than the law. Indeed, what with juries, special issues, rulings on evidence, the "technicalities" of criminal procedure, and the thousand and one other perplexing matters which the trial judge has the burden of correctly resolving then and there in the seldom tranquil atmosphere of the trial courtroom, he probably needs to be a better technician than the judges of the so-called "higher" courts. By and large, the reasons why the elective system is not calculated to produce the best judiciary apply equally to both types of courts; and few will assert that in states like Texas the trial courts are closer to perfection than are the appellate courts. The popular argument of "local self-government,"



arising from the more or less local nature of most trial courts, is really irrelevant in good part, since trial judges, like appellate judges, usually start their careers by gubernatorial appointment. The explanation for the Missouri and Kansas attitude about trial judges evidently lies, first, in the political appeal of the "local self-government" argument; secondly, in the fact that, in the democratic process, even the most desirable reforms must generally suffer a degree of illogical compromise; and lastly, in the probability that the local character of trial courts does cause the voters to be less ignorant about trial judge candidates than about those for the appellate courts with their much wider territorial jurisdiction.

It is doubtless true that, in two-party states, such as Missouri and Kansas, the main argument for reforming the elective system has been that judges under that system were elected or displaced more or less as an incident of party politics—a condition which does not prevail in one-party states like Texas. But, of course, the real point of that argument is security versus insecurity of tenure; and tenure is actually little more secure in states like Texas than it once was in Missouri and Kansas. Moreover, even in Texas, party politics actually does play a significantly undesirable part, which would be eliminated, or at least moderated, by adoption of the ABA or Missouri Plan. As noted previously, most Texas judges begin their judicial careers through appointment. If since "Reconstruction" any of these appointees has been of Republican affiliation, the fact has been kept very quiet. Although the Republican party in Texas in recent years has gained considerably in strength and undoubtedly includes in its ranks many excellent lawyers, particularly in the younger age group, no informed person will deny that for a considerable time to come none of these prospective judges has a chance of either getting on the bench or staying there without renouncement or concealment of party affiliation.

The example of Alaska merits special attention. There a society of the frontier, probably quite as egalitarian as Jackson's Tennessee ever was and more so than Jefferson's Virginia, started "from scratch" to organize a "republican Form of Government"<sup>56</sup> suitable to this latter half of the twentieth century. The lawyers sought and evidently obtained an influential voice in creating a proper judicial system. They and the others carrying the responsibility for a first state constitution canvassed the field of judicial organization, consulting "outside" experts as well as their own learning and intel-

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<sup>56</sup> U.S. Const. art. IV, § 4.

ligence. The result was the adoption of the ABA Plan, compulsory for both the appellate and principal trial courts.<sup>57</sup>

The judiciary article of the Alaska constitution, like that of Missouri and Kansas, is directed against selection, retention, or rejection of judges on the basis of politics (party or otherwise), electoral accidents, or any other basis except the professional merits or demerits of the individual concerned. At the same time it, like the others, proceeds in the affirmative fashion suggested by the ABA Plan toward lifting the judiciary to the higher professional level it should occupy. Yet the system preserves a greater measure of purely popular control than England, the federal government of the United States, or anywhere else on earth except those American states like Texas, which still cling to Jacksonian ideas of a judiciary.

The appointive selection process, limiting appointments to the list submitted by nominating commissions, has the good features of the strictly appointive system but not the bad ones. However, it should not be considered as solely a device to avoid the making of appointments on political or other improper grounds, however essential that feature of the system is. It also fulfills the highly important, difficult, and otherwise generally neglected mission of seeking out available judicial talent of superior order, even as the successful private business or professional organization not only recruits its personnel on a basis of competence, but also pursues a constant search for new talent. Should one choose to view the whole Plan as just another method of executive appointment, is it not yet highly preferable to the very appointive process that initially places the majority of Texas judges on the bench? Considering the size and complexion of the nominating commissions, the appointments made on their nomination are actually more "democratic" in origin than those made in states like Texas by the governor alone. When we add to this the feature of a popular referendum after a brief probationary term and after each succeeding regular term, the sum total seems quite as "democratic" as any thoughtful apostle of popular government might desire.

The number of these referenda will, of course, vary with the length of the regular term; and while a term of ten years is probably more practical than others, there is no vital reason why it should be greater than six years. The only difference between the referendum and an ordinary election is that in the former the popular choice does not extend to installing in office this or that self-

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<sup>57</sup> See Stewart, *supra* note 37.

nominated pretender in lieu of the appointee-incumbent selected by the nominating committee and the governor.

Admittedly the referendum is, as a practical matter, more "loaded" in favor of retaining the appointee-incumbent in office than is an elective "race" between the latter and an opponent—especially a race in which the opponent happens to have a better political name, more appealing television presence, or more funds than the incumbent for "organization" and "publicity." Indeed, it is of the very essence of the Plan that the referendum be so "loaded," because otherwise the superior legal talent required for the bench will continue to do what too much of the intelligence of America already does, *i.e.*, follow the less hazardous paths of private endeavor rather than those of public service. Moreover, it simply cannot be argued on the basis of theory, history, or current example that, in a more or less narrow and expert area like the judiciary, there is anything like a natural right on the part of the general population to select by popular vote a given individual to hold office. All these sources of knowledge of free government point in just the opposite direction.

Although undoubtedly life tenure is the most accepted form of judicial tenure in the civilized world, one may not accept the argument against the ABA Plan, that, with its peculiar referendum process, it is merely a devious method of life tenure. Even under the Texas system, the elective dice are rather "loaded" in favor of the incumbent (absent those special popular attractions on the part of the opponent, such as name, stage presence, and so on, which may well upset the "load"). Therefore, even in Texas we have a life tenure "of sorts." The trouble with it is, first, that the initial selection process is not nearly as careful as it should be and as the ABA Plan would make it and, second, that the tenure is not enough like real life tenure to attract superior judicial talent. The ABA Plan is also life tenure "of sorts," but of a much more efficient "sort" than the Texas "sort." It is the "aurea mediocritas" between real life tenure and the usual popular election system, the difference being the vital "little difference": a sufficiently greater degree of security of tenure. Yet the Plan does not provide absolute security or charge the public with the duty of individual selection, which it simply is not qualified to discharge in its own best interest.

It is thus not good logic to argue inconsistency between opposing real life tenure on the one hand (as many do) and, on the other, favoring the probable but not certain life tenure of the ABA Plan. What the arguer really has in mind, of course, is not life tenure itself, but its practical consequences. If, despite the screening pro-

cess of the Plan, the performance of the appointee-incumbent proves sooner or later seriously disappointing and yet not bad enough to qualify him for impeachment, it should not be greatly more difficult to oust him by a referendum type of election than by the present Texas practice of getting an opponent to run against him. At the same time, the inevitability of the referendum should itself be enough to keep an incumbent adequately "close to the people" (whatever such a phrase may mean), assuming that ordinarily life tenure pulls in the contrary direction, which may or may not be true. Meanwhile, if the appointee-incumbent turns out to be the excellent judge that the nominating commission and the governor thought he would, his tenure will not be subject to the hazards and distractions of possible opponents, who, for reasons sufficient to themselves, seek to appropriate for themselves his place on the bench.

Needless to say, any system which provides tenure sufficiently secure to attract the best talent must a fortiori have also an adequate retirement plan, including compulsory retirement from regular (full time) service at a proper age. Since such retirement provisions are generally considered desirable without regard to the kind of system of selection and tenure that may prevail, the point is not strictly relevant to the present Article.

The Missouri experience of some twenty years confirms what has been said in favor of the Plan. Eminent judges, lawyers, and laymen of that state, including the principal press organs, have repeatedly up to the present time<sup>58</sup> affirmed its virtues. If there is any serious dissatisfaction with the present Missouri operation, it has failed to attract much public attention. Moreover, the fact that, with the Missouri experience of at least sixteen years well in mind, other states, such as Alaska, Kansas, Iowa, Nebraska, Nevada, and Illinois have adopted the Plan, or are seriously considering it, in whole or in part, speaks louder than words in its favor. The American Bar Association, with its more than one hundred thousand membership representing every geographical area of the United States, continues with unabated enthusiasm to support the Plan after more than twenty-three years of constant and expert review of it. The American Judicature Society, composed of over twenty thousand American lawyers, recently presided over by a distinguished former president of the State Bar of Texas and dedicated to improving the administration of justice throughout the nation, constantly urges adoption of the Plan, especially in direct-popular-election states. The number of distinguished law teachers and writers favoring it probably much

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<sup>58</sup> *Supra* note 32.

exceeds the number opposed to it. Although the attitude of the press nationally on the matter would be difficult to verify, various leading newspapers, including one or more in Texas,<sup>59</sup> have given it strong editorial backing.

The Plan is, indeed, relatively novel both in point of time and method. It is also somewhat less simple than, and is argued by some to be less "democratic" than, what has preceded it in a good many American states. It is admittedly less than perfect. However, was not all of this far more the case with the Constitution of the United States when it was debated some one hundred and seventy-five years ago?

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<sup>59</sup> *E.g.*, The Dallas Morning News.