



1920

# A Nonpartisan Judiciary

Charles Kerr

*Fayette Circuit Court*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Constitutional Law Commons](#)

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

## Recommended Citation

Kerr, Charles (1920) "A Nonpartisan Judiciary," *Kentucky Law Journal*: Vol. 8 : Iss. 1 , Article 3.

Available at: <https://uknowledge.uky.edu/klj/vol8/iss1/3>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

## A NONPARTISAN JUDICIARY.

By Charles Kerr\*

---

When the Judicial was made one of the co-ordinate branches of government there was put in motion one of the greatest experiments in sovereign rule ever attempted by any nation. While embodying many of the English characteristics, our judiciary may not be accepted as a duplicate of the English system. Under a form of government where there exists no written charter, and the will of parliament is supreme, there could of necessity be no system of judicature that might bear towards our systems. complex though they may be, anything more than a few general characteristics. Under our system an act of congress may be annulled because it is unconstitutional, but under the English system the courts themselves are the subject of legislative control. The Federal system as administered in this country, is a creature of our Constitution. Congress may prescribe the mode of procedure, but congress cannot abolish the system. True it may be that the judicial is the weakest of the three branches, but it has a distinct and independent entity which neither the executive nor the legislative can destroy. The time was when there existed among certain schools of constructionists a feeling that the judiciary could be held under subjection to the legislative, and even the executive, but Chief Justice Marshall forever dissipated that heresy, and gave to the judicial an independent and dignified status.

The Federal system followed the English form of organization in that the judges are appointive, and hold their office for life or good behavior. The Thirteen Colonies, which took a formative part in the constitutional fabric, have clung to the appointive rather than the elective system in the organization of their state tribunals, believing that better results would follow a selective rather than an elective course, though there existed no uniformity in the manner and method of appointment. Virginia, North Carolina, South

---

\*Judge Fayette Circuit Court.

Carolina and New Jersey, under their first constitutions, gave to their respective legislatures the power of appointment, or election; Massachusetts, New York, New Hampshire, Pennsylvania and Maryland gave that power to the governor, while Georgia alone granted that power to the people.

When the tide of democracy began to run strong between 1812 and 1860, a period of something like a half century, several of the states either adopted new constitutions or so amended the existing ones, that the election of judges was given to the people voting at the polls in popular contest. Practically all of the new states admitted during this period, as well as those that have since been admitted, adopted the general election system, so that, at the present time nearly all the western and southern states, besides New York, Pennsylvania and Ohio, have the elective system. Not to exceed twelve states have retained the form of appointment by the governor, subject to confirmation by the senate, or election by the state legislatures, or one house thereof.

Admittedly the least desirable of all the methods is the elective. By natural intendment the elective system throws the result into a political contest. If one of the contestants should be opposed to free trade and the other favored it; if one believed in free silver and the other the gold standard, irrespective of their legal attainments, they would receive the vote of their respective parties, their election depending not on their fitness for the position, but their adherence to the tenets of a particular political organization.

Kentucky was one of the states which first adopted the appointive system, and that was the rule in Kentucky until the adoption of the Constitution of 1849. Under the first court system in Kentucky the circuit judges were appointed from the state at large, and held court in the several districts, and it may be said that in many respects it was a system that had much to commend it. Certainly the bench of the state has never been so free from local environment, or so independent, as it was during the period between the first and second Constitutions—1792 to 1799.

The debates in the convention of 1849, when the appointive system was substituted for the elective, are both instructive and

entertaining. There were in that body not a few delegates who fought to the last what they considered so grave an innovation. The question of partisanship found but few who expressed any concern on that subject, the main point of discussion being the destruction of the independence of the judiciary through causes other than political. One member proposed that a judge should be liable to impeachment if he "treated," electioneered, made speeches, or otherwise bestirred himself in seeking popular favor. Another proposed that the judges should be ineligible for re-election. On this point one member went so far as to say that Pontius Pilate would not have told the Savior he had power over life and death if he had been ineligible for reappointment. The result of the long debates was the erection of a system quite in keeping with that which exists today.

The wisdom of those who opposed the present system is, to many, daily becoming more apparent. The elective mode being a constitutional provision, however, there is no remedy save in a constitutional amendment. There are few who will give unqualified adherence to the present method of selecting our judges, though they may express a preference for the present system over the appointive. The convention of 1891 made very few changes from the system established by the convention of 1849, and such changes as it did make are for the worse. The last was essentially a populist assembly, though it had among its members some of the ablest men in the state. Its greatest weakness consisted in the fact that the delegates which composed it did not recognize the distinction which existed between organic and statutory law, and for that reason undertook to legislate for all time, believing that with them all wisdom would die.

But with all its legislating it left enough to the legislature to make the judiciary as partisan as it could well be made. We have now in Kentucky an election law which makes it compulsory upon any candidate for office to have been a member of some political party for a certain time before his name can be placed upon the ballot, whether in the primary or general election. One seeking the office of judge must, therefore, declare his partisanship before

he can become a candidate. If the district be Republican the judge will be a Republican, if it be Democratic the judge will be a Democrat. As partisans two contending candidates in the general election must have their names placed before the voters of their district. What the framers of the Constitution of 1849 conceived to be the one thing that would destroy the independence of the judiciary has now been enacted into an obligatory election statute. The repudiation of this law, and the enactment of a statute that will take the judiciary entirely out of politics, is a matter that has begun to attract the attention of the better thinking class in each party.

That the judiciary should be as free from partisan bias, and party obligation, as it is possible to render it, is not a subject about which there need be any serious discussion. Certainly the subject itself should not be a partisan one. Recognized to be a handicap, and by none more than the judges themselves, there appears no good or sufficient reason why the lawmakers of both parties should not approach the subject with a sincere purpose on the part of each one to enact such legislation as will, measurably, at least, cure the ill that all deplore.

A lawyer taken from the bar and lifted to the bench does not pass through that transformation that was experienced by Elijah and Enoch. However much one clothed with judicial authority may desire to do equal and exact justice to all, if he be a just and honest man with himself, he is ever conscious of the fact that he is a human being, beset by all the weaknesses of character and purpose that contended with him for the mastery before his judicial translation. Since the establishment of the judiciary system of Moses, down through the Greek and Roman periods, and thence through all the varying processes that have accompanied the English system of judicature, men have recognized the necessity for removing the judges as far from the influences of environment as conditions made possible. Perfection in this regard has not been found, and never will be, but much can be done that will tend, at least, to the creation of a less dependent relationship between the judiciary and the citizenry through whose franchise the individual judge receives his commission.

What can be done in Kentucky, under our present Constitution, to create a nonpartisan judiciary is a subject that will, in all probability, engage the attention of our General Assembly. Politically the circuit judges in Kentucky are about equally divided between the two dominant parties. The Legislature itself is very nearly equally divided. A more propitious time, therefore could not be found for the consideration of this subject.

Many of the states where the elective system prevails have already taken steps towards a general reformation. In some of the states there has been an entirely new order created, much after the proposals of the member from Henry county in the convention of 1849, who, as before mentioned, wanted a provision in the Constitution that would render a judge liable to impeachment who treated the voters, made public speeches in his own behalf, or used any inducements to secure a vote. To secure the results desired there would of necessity have to be a radical change in the present election laws. This, however, need cause no anxiety as the entire election laws have little to commend them to public favor. At best an agglomeration of inconsistent and contradictory provisions, enacted from time to time to suit the exigencies of occasion, the entire statutory collection might be repealed with credit to the state, and thus clear the way to a much simpler and more commendable order of procedure.

Some of the provisions of the present Constitution will not materially assist in securing some of the reforms that have been suggested by some of the bar associations of the various counties. The term is fixed at six years, and the pay limited to a maximum of \$ 4,200. The Legislature has never yet advanced the pay of circuit judges to that amount. Fixed for many years at \$3,000, this salary, by a questionable device, was increased to \$4,200. Judges in courts having continuous sessions have had the difference between \$3,000 and the maximum of \$5,000 supplied by the fiscal courts of their respective counties. The one material reform which the Legislature can create, however, is the enactment of a law which will compel the election of circuit judges and judges of the Court of Appeals, in particular, on a nonpartisan ticket. Rather

than have the candidate declare his partisanship in advance should there be enacted a law which will provide that candidates for the position of judge shall run upon a ticket which will contain no party emblem, and in seeking the office there should also be some stringent provision to the effect that no candidate shall resort to any of the usual methods of the candidate to secure his election, either through his own or the efforts of his friends. By such a method the successful candidate, under a popular election system, will be as nearly removed from partisan obligation as it is possible to accomplish. No one expects a judge, merely because he is a judge, to lose his identity as a citizen, or to express his views on questions which concern the public. The bench is not a cloister. The judge remains a citizen, and retains a citizen's interest in the public weal, and is generally compelled to express his convictions through a partisan ballot, but that is a far different matter from the partisanship of a party contest for election to the office.

The legislature cannot extend the time, as has been suggested. It cannot increase the salary beyond the constitutional maximum. It cannot change the constitutional qualifications. Many of the changes which experience would suggest will be barred by the constitutional barrier, but there is no provision of the Constitution which will prevent a change in the mode of election from a partisan to a nonpartisan method. A judge, more than any public official, ought to be free from party bias or personal obligation. No one appreciates this fact more than the judges themselves, and no one desires such freedom more than they.

The Constitution requires that all circuit judges shall be elected at stated times. The next general election will be in 1921. Unless the approaching legislature provides for a nonpartisan judiciary form of election it will be eight years before such a system can be put into effect. The necessity, therefore, for action, if action is to be had, by the present General Assembly, is most apparent. The enactment of such a law should engage the best thought of both parties, and whatever law may be passed should be passed in a nonpartisan spirit. As one who has had the experience of having been appointed by the governor, as having been elected without opposi-

tion, and as having been elected after a spirited contest of good will and good feeling on the part of a generous opponent, there exists a settled conviction that a nonpartisan judiciary system of election is the only remedy that suggests itself as a near approach to the end desired.