North Dakota Law Review

Volume 48 | Number 2 Article 8

1971

Judicial Selection in North Dakota - Is Constitutional Revision Necessary

John W. Dwyer

JUDICIAL SELECTION IN NORTH DAKOTA—IS CONSTITUTIONAL REVISION NECESSARY?

INTRODUCTION

For years legal scholars, social scientists and politicians have debated the controversial question of judicial selection.[1] Basically, the issue is and has been whether judicial selection should be by an elective or appointment method. The extensive consideration that should be given to the method of selecting our judiciary can be realized by considering the character of our judiciary system. Former Associate Justice Tom Clark of the United States Supreme Court has written:

> Justice is everybody's business. . . . It affects every man's fireside; it passes on his property, his reputation, his liberty, his life; yes, his all! Courts sit to determine cases on stormy as well as calm days. We must therefore build them on solid ground, for if the judicial power fails good government is at an end.[2]

Another writer has observed:

> If justice is to be administered effectively, we must have fair and impartial judges who, in the words of Socrates, hear courteously, answer wisely, consider soberly, and decide impartially. The selection of judges, therefore, is all important.[3]

This note will examine the history of judicial selection in the United States, the arguments for either the appointive or elective method of judicial selection, and finally, an evaluation of the North Dakota judicial selection procedure.[4]

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1. *E.g.*, Gutman, *In The Matter of Judicial Selection: Who Will Win*, 53 JUD. 114 (1969); Voorhees, *Stake of the Profession in Judicial Selection*, 53 JUD. 146 (1969); Reagan, Traynor, Grinsky, Bagley, & Finger, *California Merit Plan for Judicial Selection*, 43 CALIF. S.B.J. 156 (1968); Henderson & Sinclair, *Selection of Judges in Texas*, 5 HOUS. L. REV. 430 (1968); Garwood, *Democracy & the Popular Election of Judges: An Argument*, 16 SW. L. J. 216 (1962).

2. Sutro, *Merits of the Merit Plan Judicial Selection*, in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 154 (G. Winters ed. 1967).

3. *Id.*

4. Other matters affecting the judiciary such as tenure, removal of judges, and jurisdiction of our state courts will not be discussed although they too are important for a modern and efficient court system. Associate Professor Richard B. Kuhns, University of North Dakota School of Law, examines these areas of the North Dakota Judiciary in his article which appears at 48 N.D. L. REV. 219 (1971). This note will also confine itself

HISTORICAL BACKGROUND

In the first state constitutions, most judges were selected by appointment of the governors or the legislatures, with these appointments being subject to some type of control by a judicial council.[5] In fact, the first twenty-nine states entering the union called for their judiciary to be appointed.[6]

With the advent of "Jacksonian Democracy" during the 1830's, citizens began to feel that the people should elect almost all public officials, including judges.[7] Mississippi became the first state to have a completely elected state judiciary by adopting the election system in 1832. However, it was not until 1846 when the New York Constitutional Convention substituted popular election for appointment that the era of elected judges in this country began. By the end of the 1860's, twenty-five states provided for an elected judiciary.[8] And from the 1860's until the admission of Alaska in 1958, each new member of the union adopted the elective concept.[9] North Dakota was among these states advocating an elected judiciary when it became a state in 1889.[10]

By the end of the nineteenth century, dissatisfaction and disenchantment with the elective method had set in. In 1906, Roscoe Pound stated:

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

Joining the cause in a speech to the American Bar Association in 1913, former President William Howard Taft severely criticized partisan and nonpartisan elections. The basis of Taft's criticism

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to the selection of the North Dakota judiciary and will not attempt to analyze the selection process of our federal judiciary.

5. E. HAYNES, SELECTION AND TENURE OF JUDGES 80-135 (1944).

6. *Id.*

7. A. SCHLESINGER, THE AGE OF JACKSON ch. XXV (1945).

8. REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE, 39TH LEGISLATIVE ASSEMBLY 46 (1965).

9. However, the two latest states admitted to the Union, Alaska and Hawaii, both provide for an appointed judiciary. Hawaii allows the executive to make the appointments while Alaska follows the Merit Plan of appointment. The Merit Plan referred to has several other names. It is called the Missouri Plan after the first state to use it, the American Bar Association Plan, after ABA endorsement of it in 1937, the American Judicature Society Plan and the Kales Plan. For the purpose of this note, it shall be known as the Merit Plan unless otherwise indicated.

10. E. HAYNES, SELECTION AND TENURE OF JUDGES 124 (1944). Before North Dakota became a state, there were no elected judges or justices of any courts of record. Rather, the judges for the Dakota Territory were all appointed by the President of the United States. REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE, 39TH LEGISLATIVE ASSEMBLY 46, 47 (1965).

11. This statement occurred in a speech entitled *The Causes of Popular Dissatisfaction with the Administration of Justice*, which is reprinted in 46 J. AM. JUD. SOC'Y. 55, 66 (1962).

was that unqualified persons could run entirely on their own and get elected through aggressive campaigning.[12]

In that same year the American Judicature Society advocated a return to the appointment method by sponsoring the nonpartisan appointive-elective plan, better known today as the Merit Plan.[13] Formulated first by Professor Albert M. Kales of Northwestern University, the Merit Plan was given the official endorsement by the American Bar Association House of Delegates in 1937. The essentials of the Merit Plan are:

(1) Nomination of qualified judicial candidates by a non-political commission or council composed of members of the legal profession and laymen. (Selection essential)

(2) Appointment of judges to fill judicial vacancies by an elected official. (Appointment essential)

(3) Tenure by non-political vote of the people that calls only for voter approval or disapproval of a judges' record. If a judge's record is approved, the judge continues in office for another term, but if disapproved, another judge is appointed.[14] (Tenure essential)

In 1940, Missouri became the first state to adopt the essential provisions of the Merit Plan for most but not all of its appellate and trial bench.[15] Maryland in the same year adopted the "tenure essential" for the People's Court of Baltimore City. The decade of the 1950's found the Merit Plan being adopted for the trial and appellate courts of Alaska, for the Supreme Court of Kansas, and the "selection essential" only for the Circuit Court of Jefferson County in Birmingham, Alabama.

In the 1960's, nine states have adopted the three essentials listed above for the selection of most if not all of their judiciary. Alaska, Colorado, Oklahoma, and Vermont fill all of their state judiciary vacancies by the Merit Plan. In Iowa, Nebraska, New

12. Taft, *The Selection and Tenure of Judges*, 38 A.B.A. REP. 418-435 (1913).

13. REPORT OF THE NORTH DAKOTA LEGISLATIVE COMMITTEE, 39TH LEGISLATIVE ASSEMBLY 46 (1965); ABA SECTION OF JUDICIAL ADMINISTRATION, HANDBOOK: THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 46 (5th ed. Stevens ed. 1971).

14. ABA SECTION OF JUDICIAL ADMINISTRATION, HANDBOOK: THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 45 (5th ed. Stevens ed. 1971); Address by Obert C. Teigen, associate justice, North Dakota Supreme Court to the North Dakota Constitutional Convention's Committee on Judicial Functions and Political Subdivisions, August 30, 1971. Variations of these three "essentials" are found in some states, but even then, the concept of each "essential" is included in the variations.

15. The Merit Plan was not adopted for all of the appellate and trial bench of Missouri because it was feared that the rural voters would not support such a plan for the rural districts. Thus, country voters were assured that by supporting the Merit Plan, the political corruption would be "cleaned up" in the big cities without affecting their local courts. However, the Merit Plan may be adopted in these areas by local option vote although it has never been exercised. Winters, *Judicial Selection and Tenure*, in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 35 (G. Winters ed. 1967).

Mexico, Idaho, and Utah appointment of judges are made in all but the minor courts.[16]

The last decade also found North Dakotans attempting to adopt the Merit Plan of judicial selection.[17] Primarily through the efforts of the North Dakota Bar Association, the 1965 North Dakota Legislative Assembly passed a resolution to provide for an amendment to the North Dakota Constitution[18] calling for a change in the selection of judges from the present non-partisan elective method to an appointive-elective system.[19] The proposed constitutional

16. Other states using the Merit Plan of selection are California for judges of the supreme court and appellate courts, Louisiana for judges of certain lower courts such as New Orleans Traffic Court, Georgia for the Atlantic Traffic Court, New York for the New York City Courts which is done under the mayor's appointive power, Alabama for the Circuit Court of Jefferson County, and Florida for the Metropolitan Court of Dade County. States adopting just the "tenure essential" of the Merit Plan, the periodic non-competitive election, are Pennsylvania (state-wide courts) and Illinois (general trial courts). Added to this, the Commonwealth of Puerto Rico fills all judicial vacancies by appointment. Thus, at the present time, there are 21 states which use all or part of the Merit Plan for judicial selection. BOOK OF THE STATES: 1970-1971, at 120, 124, 125 (1971); Winters, *Improved Methods of Selecting Judges*, ABA SECTION OF JUDICIAL ADMINISTRATION, HANDBOOK: THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 48 (5th ed. Stevens ed. 1971). According to this American Bar Association publication, the provision in the various states enacting part or all of the Merit Plan came into being by:

> [Constitutional] authority in Missouri, Alabama, Alaska, Kansas, Iowa, Nebraska, Colorado, Idaho, Utah, Illinois, and Pennsylvania; by statute in Maryland, Louisiana, Georgia, and Vermont; by executive action in Puerto Rico, New Mexico, and New York; and by County Charter in Dade County, Florida. In California merit tenure and in Oklahoma both selection and tenure for appellate courts was under constitutional authority, while selection for all other courts in Oklahoma was by executive action of the governor.

17. In 1960, the State Bar Association of North Dakota established a special Judicial Selection and Tenure Committee to study the Merit Plan. This committee was merged with the Judiciary Committee of the State Bar Association of North Dakota into the Judicial Improvement Committee in 1962. After meeting to consider different selection proposals, this Judicial Improvement Committee recommended adoption of a Merit Selection and Tenure Plan. Following this recommendation, the members of the State Bar Association adopted a resolution advocating adoption of a Merit Plan at their annual meeting in 1963. The enthusiasm of the Bar Association for the Merit Plan resulted in their sponsoring a North Dakota Citizen's Conference on Judicial Selection and Tenure in 1964. A proposed constitutional amendment for Merit Selection which was drafted by the Juricial Improvement Committee was discussed at the conference. NORTH DAKOTA BAR ASSOCIATION, NORTH DAKOTA CITIZEN'S CONFERENCE ON JUDICIAL SELECTION AND TENURE 13, 28-29 (1964).

18. N.D. CONST. art. IV, § 90, provides as follows:

> The judges of the supreme court shall be elected by the qualified electors of the state at general elections. The term of Office shall be ten years and the judges shall hold their offices until their successors are duly qualified and shall receive such compensation for their services as may be prescribed by law. Provided that this section shall not be applicable to the terms of office of judges of the supreme court elected prior to the general election of the year 1934, at which election three supreme court judges shall be chosen; and the candidate at said election receiving the highest number of votes shall be chosen; and the candidate at said election receiving the highest number of votes shall be elected for a term of ten years, the candidate receiving the next highest number of votes shall be elected for a term of eight years and the candidate receiving the next highest number of votes shall be elected for a term of six years.

N.D. CONST. art. IV, § 104, which provided for the election of district judges, would also have been amended by this resolution of the 1965 North Dakota Legislature.

19. N.D. SESS. LAWS ch. 481 (1965). The proposed constitutional amendment was drafted by the Legislative Research Committee, REPORT OF THE LEGISLATIVE RESEARCH COMMITTEE, 39TH LEGISLATIVE ASSEMBLY 45, 46 (1965). It appeared on the November 8, 1966 ballot as follows:

> 1.) Amendment. Section 90 of the Constitution of the State of North Dakota is hereby amended and reenacted to read as follows:

amendment was put to the voters of North Dakota in the election of November 8, 1966, and was defeated by 9,413 votes.[20] Another attempt was made in 1968 as the 1967 legislature submitted basically the same resolution to the voters in the primary election of September 3, 1968.[21] Again, the proposed amendment was defeated, this time by a larger margin.[22] The issue continues to be a subject

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Section 90. A vacancy as defined by the law occurring in the office of Judge of the Supreme Court or District Court shall be filled by the Governor from a list of three nominees presented to him by the judicial nominating commission. If the Governor shall fail to make an appointment from the list within thirty days from the day it is presented to him, the appointment shall be made by the Chief Justice of the Supreme Court from the same list within fifteen days. At the next general election after the expiration of three years from the date of appointment and every ten years thereafter, Judges of the Supreme Court shall be subject to approval by a majority vote of the electorate voting upon the question. At the next general election after the expiration of three years from the date of appointment and every six years thereafter, Judges of the District Courts shall be subject to approval by a majority vote of the electorate voting upon the question. In the case of a Judge of the Supreme Court the electorate of the state shall vote on the question of approval. In the case of a Judge of the District Court, only the electorate of that judicial district shall vote on the question of approval. The Chief Justice shall be selected as provided by law. All judges shall hold their offices until their successors are duly qualified and shall receive such compensation for their services as may be prescribed by law.

There shall be a judicial nominating commission which shall select the nominees for appointment to the office of Judge of the Supreme Court and District Courts. The membership of such commission shall consist of the Chief Justice of the Supreme Court, who shall act as chairman; one member of the North Dakota state bar association from each judicial district, who shall be appointed by such association; and one citizen, not a member of the bar, appointed by the Governor for staggered terms of six years from each judicial district. No member of the judicial nominating commission appointed by the Governor shall hold an elective office in the state, federal, or county governments.

2.) The Constitution of the state of North Dakota shall be amended by adding thereto the following section:

Any person elected or appointed to an office of Judge of the Supreme Court or District Court of this state prior to the effective date of Section 90 of the North Dakota Constitution, as amended at the general election held in November, 1966, shall serve the term for which he was elected or appointed and shall be eligible to succeed himself for reelection by submitting his name to the electorate for approval or rejection as provided by law and this Constitution unless he shall die, resign, or be removed from office prior to the expiration of his term, whereupon the office shall be filled as prescribed by law and this Constitution.

20. OFFICIAL ABSTRACT OF VOTES CAST AT THE GENERAL ELECTION HELD NOVEMBER 8, 1966 (Secretary of State's Office, Bismarck, North Dakota).

21. N.D. SESS. LAWS ch. 517 (1967). This constitutional amendment was more comprehensive than the 1965 proposal as it dealt with two whole judiciary sections of the North Dakota Constitution. Briefly, it provided:

> [F]or the amendment of sections 85, 90, 94, and the powers of the judiciary, changing the selection of judges from an elective to an appointive-elective system, preserving the tenure of judges presently in office and those who would take office prior to the effective date of this amendment; to provide for the retirement, discipline and removal of supreme and district court judges; to provide for requirements to declare a law unconstitutional; providing for judicial districts, judicial council, and to repeal sections 88, 89, 92, 93, 95, 97, 98, 102, 104, 105, 106, 107, 108, 109, 112, 113, 114, 115, 116, 117, and 118, relating to procedures of state courts, all of such sections amended and repealed being a part of the Constitution of the state of North Dakota.

22. In the primary election of September 3, 1968, the margin of disapproval was 12,304 votes. OFFICIAL ABSTRACT OF THE VOTES CAST AT THE PRIMARY ELECTION HELD SEPTEMBER 3, 1968 (Secretary of State's Office, Bismarck, North Dakota).

One of the primary reasons given by the North Dakota Bar Association

of debate for North Dakota citizens.[23]

ELECTION vs. APPOINTMENT

The nominating commission is regarded as the most important aspect of the Merit Plan, or appointment method. The primary purpose of the commission is to give extensive consideration to a judicial candidate's ability and character in order to give the governor or elected official making the appointment a list of the best qualified candidates available. However, proponents of the elective system argue that the appointive method allows the governor to choose the least qualified judicial candidate from the list of nominees submitted by the nominating commission.[24] Yet appointive advocates contend they do not believe a governor can appoint "a least qualified judicial candidate" because the nominees are the best from a group of candidates that already contains well-qualified candidates.[25] Furthermore, the advocates of the Merit Plan assert that the result is better qualified judges because the nominating commissions are better able to judge the abilities and qualities needed for judges than the electorate. Lawyers and judges are on the nominating commissions and by the very nature of their profession, they should be able to evaluate legal ability and talent better than the average layman.[26]

On the other hand, proponents of an elective system contend that the nominating commission deprives the right of the people to choose the judiciary—that by substituting an appointive for an elective method an erosion of the processes of free government occurs.[27] However, it is questionable whether an elective method really provides the people with a choice. In North Dakota, any vacancy on the supreme court caused by "death, resignation, or otherwise," is filled by appointment by the governor, with such

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for the defeat of the proposed constitutional amendments during the 1966 and 1968 election was that there was very little money spent during the campaigns to support these measures.

23. At the August 30, 1971, meetings of the North Dakota Constitutional Convention's Committee on Judicial Functions and Political Subdivisions, judges, lawyers, and organizations testified on the subject before the Committee. Those testifying were: Chief justice Alvin C. Strutz, associate justice Harvey B. Knudson, William L. Paulson, and Obert C. Teigen of the North Dakota Supreme Court; Pat Conmy, Hugh McCutcheon, and Herman Weiss of the North Dakota State Bar Association, and Mrs. Corliss Mushik of the League of Women Voters of North Dakota.

24. Address by the chief justice of the North Dakota Supreme Court, Alvin Strutz, to the North Dakota Constitutional Committee on Judicial Functions and Political Subdivisions, August 30, 1971.

25. R. Niles, *The Changing Politics of Judicial Selection: A Merit Plan for New York,* in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 68, 76 (G. Winters ed. 1967).

26. G. Winters, *The Judicial Nominating Committee,* in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 127 (G. Winters ed. 1967).

27. Address by the chief justice of the North Dakota Supreme Court, Alvin Strutz, to the North Dakota Constitutional Convention's Committee on Judicial Functions and Political Subdivisions, August 30, 1971.

appointment lasting until the first general election.[28] At the present time, two of North Dakota's five supreme court justices, and eight of sixteen district court judges have originally taken office by appointment.[29] Under the Merit Plan, the governor of North Dakota would not be able to make an appointment without restrictions as he is able to do now. He would have to select a judicial candidate from a panel of qualified nominees chosen by the nominating commission.

Another factor which negates the idea that the people really have a choice by electing their judges is the number of uncontested elections. In the last 20 years of North Dakota elections, nearly 50 per cent of the supreme court elections were not contested. In the years from 1950 to 1970, elections for district judges were uncontested nearly 80 per cent of the time.[30] Added to this, there is evidence that North Dakota voters are indifferent as to the outcome of judicial elections.[31]

However, under the Merit Plan, proponents contend that the people still have a choice in judicial selection. Under the Merit Plan, the electors still exercise their franchise as they vote by non-political judicial ballots calling for approval or disapproval of a judge. Instead of running against an opponent, the incumbent judge runs on his record and if disapproved, another judge is appointed from nominees submitted by the nominating commission.[32]

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28. N.D. CONST. art. IV, § 98; District Court vacancies are also filled by appointment from the governor, Gunderson v. Byrne, 59 N.D. 543, 231 N.W. 862 (1930). Nationwide statistics indicate over 56 percent of the judges in the "elective" states went on the bench by appointment during the years of 1948-57. Winters & Allard, *Two Dozen Misconceptions about Judicial Selection and Tenure,* in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 130, 131 (G. Winters ed. 1967).

29. REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE, 39TH LEGISLATIVE ASSEMBLY 47 (1965). Commenting on lower courts, this publication states:

> [C]omplete information is not available on the lower court judges, but the information that we do have indicates that the majority of the judges in the county courts of increased jurisdiction initially took office by appointment and, in spite of a lack of figures, we know that the overwhelming majority of the county justices went into office by appointment after the office was created in the respective individual counties. We have no information as to the number of county judges and police magistrates who have taken office by appointment.

30. These figures were obtained from OFFICIAL ABSTRACTS OF VOTES CAST AT GENERAL NOVEMBER ELECTIONS FROM 1950 to 1970 (Secretary of State's Office, Bismarck, North Dakota).

31. In the 1968 general election, the judges of the Supreme Court received only 73% of the votes cast. In the 1970 general election, the Supreme Court received about 70% of the total vote. In the district judge elections in 1970, as few as 65% of the voters of one of North Dakota's districts voted for a judge. OFFICIAL ABSTRACT OF VOTES CAST AT THE GENERAL ELECTION HELD NOVEMBER 5, 1968 & OFFICIAL ABSTRACT OF VOTES CAST AT THE GENERAL ELECTION HELD NOVEMBER 3, 1970 (Secretary of State's Office, Bismarck, North Dakota). *See also* Klots, *The Selection of Judges and the Short Ballot,* in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 108, 113 (G. Winters ed. 1967); Winters & Allard, *Two Dozen Misconceptions about Judicial Selection and Tenure,* in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 130, 132 (G. Winters ed. 1967).

32. The type of ballot is usually as follows:

> "Shall Judge _____
> (Here the name of the judge shall be inserted)
> of the _____ be re-
> (Here the title of the court shall be inserted)

Chief Justice Alvin C. Strutz, of the North Dakota Supreme Court, criticizes this reasoning:

> If the people are not competent to elect a man as judge under our present system, how in the name of common sense will they be any more competent to pass on a judge's right to be retained after he has served for three years in office? Remember: When a judge's name appears on the ballot and the people are asked to retain or reject him, they have no idea who is going to take his place if he is rejected. The tendency would be for the electorate to feel that they might get an even worse judge than the one whose name appears on the ballot, and therefore they would be inclined to vote for his retention.[33]

Chief Justice Strutz indicates that the Merit Plan gives the judge life tenure, causing an over-complacent judiciary. However, Merit Plan advocates argue that possible life tenure has a favorable consequence on a judge's behavior. The result is that it gives a judge independence permitting him to make a decision based on the merits of the case, rather than being subjected to outside pressures confronting an elected judge.[34] Even if a judge becomes arbitrary in his treatment of lawyers and judges before the court because of possible life tenure, the voters still have the power to remove him. Although it is true that removal rarely occurs,[35] this problem can be avoided by placing the emphasis on judicial selection and thereby preventing unqualified judges from getting on the bench in the first place.[36]

One of the primary contentions of the supporters of the Merit Plan is that it takes the courts out of politics. Although it is conceded that it is impossible to remove judicial selection entirely from politics, it should be the goal to remove it as far as possible. Election advocates answer that Bar politics is substituted for the politics of a campaign. They defend their claim on the grounds that the bar has too great an influence on the selection of judges.[37] But it is important to note that the nominating commission is made up of laymen who have as much authority on the commis-

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tained in office? Yes ☐ No ☐ (Mark an X in the box you prefer.)" MO. CONST. art. V, § 29(c)(1).

33. Address by the chief justice of the North Dakota Supreme Court, Alvin Strutz, to the North Dakota Constitutional Convention's Committee on Judicial Functions and Political Subdivisions, August 30, 1971.

34. R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND THE BAR 346 (1969).

35. *Id.* at 345. However, removal has been accomplished by the Missouri voters.

36. Roscoe Pound has stated, "Too much thought has been given to the matter of getting less qualified judges off the bench. The real remedy is not to put them on." Pound, *Introduction* to E. HAYNES, SELECTION AND TENURE OF JUDGES xiv (1944).

37. Harding, *The Case For Partisan Election of Judges,* 55 A.B.A.J. 1162, 1163 (1969). This article also indicates that judges are in fact "partisan political officers vested with political authority whose use is affected by partisan dispositions." Because judges formulate public policy, they "should and must conform to the will of the people."

sion as a lawyer or judge. In fact, studies of nominating commissions indicate that laymen have sufficient confidence, as well as independence, and are not influenced by the bar. Furthermore, it appears attorneys have been conscientious in making honest appraisals of the candidates.[38]

In most states the nominating commission is composed of an equal number of laymen and lawyers with an appellate judge presiding as chairman.[39] Variations in the composure of the nominating commission are exemplified by Colorado which provides for the laymen to be a majority on the commission[40] and Kansas which prevents any judge from being a member of the commission.[41]

Selection of the nominating commission members also varies as many combinations have been advocated. Lawyers have been appointed by state officials,[42] elected by the bar members in each congressional district[43] or elected by the state bar association at large.[44] Laymen are usually appointed by the governor.[45] In addition, the terms of the members are usually staggered and no voting member of the commission is allowed to hold political office.[46]

Another contention by Merit Plan advocates is that the necessity of a political campaign under the elective method poses many problems for a judicial candidate. In a small state like North Dakota, if a considerable amount of money is spent by the candidate on publicity, he could reach most of the voters. It is the wealthier judicial candidate who will have the advantage. Not only would the Merit Plan eliminate this problem, but it would also give judges the opportunity to spend more time on judicial matters. The result would be the promotion of court efficiency and the acceleration of the administration of justice.[47]

The appointment advocates also point out that although a judge may be better qualified than his opponent, he may be defeated because he is not a skilled campaigner. Added to this, many

38. Niles, *The Changing Politics of Judicial Selection: A Merit Plan for New York*, in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 68, 75 (G. Winters ed. 1967).

39. *See also* Ballot, *supra* note 19. The proposed constitutional amendments in North Dakota provided for a commission membership of the chief justice of the Supreme Court as chairman, with lawyers and laymen from each judicial district being appointed by the State Bar Association and the governor respectively. There are six judicial districts in North Dakota.

40. COLO. CONST. art. VI, § 24(2)(3).
41. KAN. CONST. art. 3, § 2(f)(4).
42. COLO. CONST. art. VI, § 24(4).
43. KAN. CONST. art. 3, § 2(f)(2).
44. KAN. CONST. art. 3, § 2(f)(2).
45. MO. CONST. art. 5, § 29(d).
46. COLO. CONST. art. VI, § 24(2)(4).

47. The executive director of the American Judicature Society comments on this problem by saying, "These activities, and the election campaign itself, deprive the litigants and the taxpayers of time that should be spent in judicial work." Winters, *Improved Methods of Selecting Judges*, in ABA SECTION OF JUDICIAL ADMINISTRATION, HANDBOOK: THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 44, 45 (5th ed. Stevens ed. 1971).

lawyers will not give up the practice of law because of the risk of defeat which could in turn have an adverse effect on a reputable private practice built up over many years. The field of choice between candidates is narrowed considerably because of these deterrents. A nominating commission would consider all candidates and their qualifications regardless of whether or not they had the characteristics necessary to impress the electorate.[48]

Probably the most serious problem facing judicial candidates in a political campaign is ethical in nature. Campaigns cost money and require management and assistance from members of the bar or friends. The impartial attitude needed by a judge in the administration of justice becomes suspect when contributors of money or work appear before this judge in court as either attorneys or litigants.

Judicial Canon 32 reads as follows: "A judge should not accept any presents or favors from litigants, or from lawyers practicing befor him or from others whose interests are likely to be submitted to him for judgment."[49] This canon can be circumvented by directing gifts to a committee, not to the judge himself. Yet the judicial candidate obviously knows who has given him contributions and that these contributions will be used for his benefit. Query, how can a judge remain free from influence and refrain from incurring obligations?

Judicial Canon 30 raises a related problem:

> If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.
>
> He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.[50]

Friends and campaign workers may insist on doing work for a judge during his campaign which involves using the judicial office to further his candidacy. It seems natural that the judicial candidate running for re-election would be advertised by campaign workers as a "judge" having experience, and as a "judge" who has fulfilled the duties of his office remarkably well. The practical necessities of a democratic election seem to outweigh professional ethics.

Other problems are created with *Judicial Canon* 12 which prevents patronage in appointing "[t]rustees, receivers, masters, . . .

48. Address by Obert C. Teigen, associate justice, North Dakota Supreme Court to the North Dakota Constitutional Convention's Committee on Judicial Functions and Political Subdivisions, August 30, 1971.

49. ABA CANONS OF JUDICIAL ETHICS No. 32.

50. ABA CANONS OF JUDICIAL ETHICS No. 30.

and other persons . . . to aid in the administration of justice. . . ."[51] Although it is human instinct to award active campaign supporters, these appointments must be made with "the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan. . . ." reasons.[52] Query, is this practical in the climate and aftermath of a political campaign?

One writer, commenting on the above ethical problems, has observed:

> It is unfortunately plain . . . that even the most ethically conducted campaign involves a series of exceptions to the canons which warp their spirit and which add nothing to the public respect for our judicial system. . . . As long as a judge's campaign committee must accept gifts of money and work from lawyers, there will be gnawing doubts as to his freedom from influence and bias.[53]

CONCLUSION

A recent study of the Missouri Merit Plan indicates that both lawyers and judges believe it has resulted in putting better judges on the bench. Furthermore, judges selected under the Merit Plan in Missouri were given a higher "performance rating" than those selected through election. The outstanding fact of this study established that the Merit Plan in Missouri has tended to exclude "highly incompetent persons" from the state judiciary.[54]

The results of the Merit Plan in states like Missouri which have had the appointment method for 30 years may provide an incentive to adopt the Merit Plan in North Dakota. Although it is true there is no actual proof of which method provides the best judges, it should be evident after the discussion of the merits of the two methods that several problems with the elective method are removed and that better judges should be chosen under the merit system, whether it be from a common-sense or theoretical point of view.

That better judges can be chosen by having judicial representation on a nominating commission is apparent. Lawyers should know

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51. ABA CANONS OF JUDICIAL ETHICS No. 12.

52. *Id.*

53. Anderson, *Ethical Problems of Lawyers and Judges in Election Campaigns,* 50 A.B.A.J. 819, 823 (1964). Another writer states: "Judges in elective states are obliged to engage in political activities and to seek publicity for themselves in ways that prejudice their judicial independence and demean the judicial office." Winters, *Improved Methods of Selecting Judges,* ABA SECTION OF JUDICIAL ADMINISTRATION. HANDBOOK: THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 44, 45 (5th ed. Stevens ed. 1971).

54. Specifically, six out of every eight attorneys practicing in the two major cities of Missouri sustained the above conclusion. R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND BAR 345 (1969); A study of the Texas judiciary also indicates that lawyers and judges think the quality of judges is better under an appointive method. B. HENDERSON & T. SINCLAIR, THE SELECTION OF JUDGES IN TEXAS: AN EXPLORATORY STUDY 103-118 (1965).

which persons are best qualified for judicial service. If a farmer or rancher in North Dakota were being selected to represent agricultural interests on a policy and decision making board, would it not be a good idea to have farmers and ranchers assisting in the selection of this individual? But it is also agreed that purely technical skills are not the only considerations that should be evaluated. Thus, the Merit Plan provides for the broader viewpoint of laymen on the non-legal considerations of general intelligence, education, personal integrity and the more human qualities which are as essential for selecting the best judges as are evaluations of professional skills by attorneys.

Alvin C. Strutz, chief justice of the North Dakota Supreme Court, when commenting on North Dakota's present elective method of selection has said, "This system has worked very well, and we have had absolutely no scandal in our courts since statehood."[55] Although it may be true that our present North Dakota selection method has worked "well" in the past, it should be incumbent upon the North Dakota Constitutional Convention to adopt a plan of selection that would obtain the best qualified judges available—not just something that has worked "well."

Not only would the best judges be selected for our state judiciary by adopting the Merit Plan, but present problems with our existing method of selection would be eliminated. Under the present North Dakota Constitution, the Governor is able to make appointments in the case of a vacancy by death or resignation, without any restrictions or recommendations. The number of uncontested judicial elections and lack of voter interest indicate that the people do not really have a choice under the elective method. The drafters of the North Dakota Constitution could curb the present problems and guarantee our citizens against possible future problems that could be disastrous by adopting the Merit Plan of judicial selection.[56]

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55. Address by chief justice of the North Dakota Supreme Court, Alvin Strutz, to the North Dakota Constitutional Convention's Committee on Judicial Functions and Political Subdivisions, August 30, 1971.

56. Future problems proving disasterous can be visualized by noting the primary factors causing the first states to adopt the Merit Plan—these factors being political corruption of the judiciary and ineffective administration of justice under the elective method. Hyde, *The Missouri Method of Choosing Judges*, 41 J.AM. JUD. SOC'Y. 74 (1957); Hall & Schroeder, 25 *Years' Experience With Merit Judicial Section in Missouri*, 44 TEX. L. REV. 1088, 1093 (1966).

Proponents of North Dakota's nonpartisan election ballot for the judiciary contend that it is only states with partisan ballots for the judiciary where political corruption occurs. The Executive Director of the American Judicature Society, however, feels that the nonpartisan election may be worse than the partisan election of the judiciary. He states:

> [While] nonpartisan election does indeed eliminate some of the evils of partisan election, it is still highly political, and it still emphasizes non-judicial rather than judicial qualifications, as a basis for selection. In one respect it is worse than partisan elections in that it actually makes it possible for a candidate to get his name on the ballot who has to commend

All three essentials of the Merit Plan should be adopted in North Dakota for the selection of judges in the North Dakota Supreme Court and the North Dakota District Courts. The only variations necessary are that the nominating commission should be composed of more laymen than lawyers and that a judge should not be the chairman of the nominating commission. This would eliminate the opportunity for critics to charge that the Merit Plan leaves the selection of judges entirely to the State Bar Association or that lawyers and judges would dominate a nominating commission even though laymen are represented.[57]

A problem with advocating the adoption of the Merit Plan in North Dakota is that some North Dakota politicians have indicated that they will do everything possible to defeat the newly adopted constitution if any of the present elective positions are changed to appointment.[58] If this is a deterrent to the delegates of the Constitutional Convention in changing existing method of selection, the constitution could at least allow for the selection method to be changed by the legislature from existing non-partisan election method to the Merit Plan of judicial selection including all three "essentials" and variations mentioned in the preceding paragraph.[59] Flexibility

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him, but his own ambition and perhaps his inability to make a living as a lawyer, and whom no political party would be willing to sponsor.

Winters, *Improved Methods of Selecting Judges,* in ABA SECTION OF JUDICIAL ADMINISTRATION, HANDBOOK: THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 45 (5th ed. Stevens ed. 1971).

57. An additional reason for not allowing a judge to be chairman of the nominating commission is that laymen tend to give the judge an "aura" because of his position and lawyers may refrain from disagreeing with a judge because it may jeopardize their relationship and adversely affect the lawyer the next time he is in the judge's court.

58. Grand Forks Herald, July 24, 1971, at 1, col. 4. This article states the following:

> Referral leader Robert P. McCarney, long a thorn in the side of the North Dakota legislature, threatened Friday to campaign against adoption of a new constitution for the state.
> McCarney told a newsman he would wage such a campaign if the Constitutional Convention proposes a revision which would convert any state elective position to appointive ones.
> "If the Constitutional Convention tries to put in appointive positions, I'll campaign all over to kill that constitution," he said.

State Senator George Longmire (R-Grand Forks) acknowledges this problem: "Appointment of judges has much merit. However, the majority of people in North Dakota probably aren't willing to give up their right of electing judges." The Dakota Student, October 5, 1971, at 1, col. 3.

59. Proposals have been made to the North Dakota Constitutional Convention's Committee on Judicial Functions and Political Subdivisions which would allow the legislature to change the method of judicial selection by statute. A constitutional amendment would not be necessary. Proposals made to the committee are the *Gefreh Proposal,* by Judge Gefreh, and *Committee Working Draft No.* 2. Section 5 of the *Gefreh Proposal* is as follows:

> Any vacancy happening by death, resignation or otherwise in the office of judge of the supreme court or the district court shall be filled by appointment, by the governor from a list of three nominees offered by a judicial nominating committee as constituted and prescribed by the legislature, which appointment shall continue until the first general election thereafter, when said vacancy shall be filled by election unless a different mode of selection shall have been provided by the legislature.

Section 3 of the *Committee Working Draft No.* 2 provides for the election or appointment of District Judges:

> As provided by law, the state shall be divided into judicial districts in each

would be accomplished by allowing the legislature to make the changes if unhealthy circumstances arose in the judiciary of our state. The long procedure and campaigns required by a constitutional amendment at the present time would not be necessary and the legislature could make the change to an appointment method during the next legislative session.

However, it is hoped that North Dakota will adopt all of the Merit Plan essentials in their constitution and that no limitations will be placed upon it. Twenty-one progressive states now have some or all of the Merit Plan of selection for their judiciary. The opportunity of merit selection presents itself—will North Dakota seize that opportunity?

JOHN W. DWYER

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of which shall be elected or appointed one or more judges and in each of which districts shall be organized functional probate, civil, criminal, juvenile, and such other divisions and such administrative offices of such court as may be provided by law or rule.