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Denver Law Review

Volume 25 | Issue 2 Article 2

June 2021

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Peter H. Holme, Jr., Another View of the Judiciary Committee's Plan - A Reply to Judge Clements, 25 Dicta 35 (1948).

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Another View of the Judiciary Committee's Plan

A Reply to Judge Clements

By PETER H. HOLME, JR.,
of the Denver Bar

Author's note: Since the foregoing article went to press, I have received the word of Judge Clement's death. From my acquaintance with Judge Clements, I feel sure he would be willing and anxious that the article written in answer to his last publication should be published as written and without apology. Judge Clements was a sincere and forceful debater, and gave his opponents full opportunity to be heard. I am sorry that the said circumstances of his death must make mine the last word in this debate.

In the December number of DICTA appeared an article by Judge Clements, Judge of the County Court of Delta County, criticizing the plan of the Judiciary Committee of the Colorado Bar Association for improvements in the Colorado judicial system. Judge Clements wrote with such taste and restraint that the generalities of his criticisms may have been submerged in the reader's mind by the charm of his writing. Therefore, I feel called upon to make a few rejoinders.

The judge's article was in two parts: The first, expressing his objections to the committee's plan for non-partisan selection of judges through the use of nominating commissions and appointment by the governor and also of the committee's proposed compulsory retirement of judges who have attained age 75; the second part expressing Judge Clements' ideas of what new laws are needed in connection with the judiciary.

In his criticism of the committee's plan, the judge makes two main points: First, that the use of nominating commissions to select candidates from whom the governor must appoint a judge to fill a vacancy is undemocratic and radical, because it takes away from the people the power to select their judges; second, that the provision of compulsory retirement at age 75 is arbitrary and unsound, because many judges at that age are at the peak of their abilities.

In the first point the judge begins with a false premise. He suggests that the people select our judges under the present system. This is clearly not the fact, and later, Judge Clements admits it, "It is a matter of common knowledge that lawyers dominate our judicial conventions . . ." If the judge by judicial conventions refers to conventions concerning our laws and judicial system perhaps he may be right. Who else should dominate the consideration of amending our laws or judicial system? If, however, he refers to party caucuses and nominating conventions then I submit he is wrong. The lawyers do not dominate such conventions or if it should happen that such lawyers as participate in them have the greatest influence such lawyers are not ordinarily representative of the entire bar. Unfortunately perhaps

most lawyers are too busy with practice to be concerned with politics.

To get to the point, candidates for judicial positions are selected by the party leaders, including the perennial office holders, tavern owners and those who dig into their own pockets to finance the campaigns. Under the best of circumstances judicial candidates are agreed upon by party leaders from both parties in order to obtain the best candidates available without reference to party affiliations or rather in an effort to have each party represented. In the past in some judicial districts this system has worked very well but there is now clear evidence in some of the judicial districts along the Eastern slope, including Denver that selection of judges on a party basis is becoming stronger as public opinion on national politics becomes more tense. We cannot go on forever depending on Providence and the interest of party leaders in the public good to maintain a sound judiciary or improve it.

The judge says that the Missouri system is "still in the experimental stage." Actually, it has been in operation for seven years, has been chosen three times by the voters of Missouri, each time with a larger margin of voters favoring it, is being seriously considered in many states as the best and most intelligent method of selecting judicial material. The basic idea of this plan, however, was worked out thirty or forty years ago by the American Bar Association and the American Judicature Society and was officially endorsed by the American Bar Association in 1937. Its origins go back as far as Jeremy Bentham, more than one hundred years ago, who said, "though it is better that judges should not be selected by popular election, the people of their district ought to have the power, after sufficient experience, of removing them from trust." Must we wait another hundred years before we try it?

In the files of the Judiciary Committee are copies of letters from a score of leading lawyers in Missouri, all but two of whom have stated that the system with such faults as it has is worth maintaining and if the issue were presented anew they would vote for it again. An able exposition of the plan appears in the American Bar Association Journal for December, 1947, on page 1, by James M. Douglas, Chief Justice of the Missouri Supreme Court.

Under our present system, I maintain, the voters do *not* select the judges. They merely choose between two or more placed before them by the party leaders. Furthermore, two of the members of our present Supreme Court and fourteen of our twenty-eight district judges were appointed to office by the governor to fill vacancies. In most instances in the history of our state the governor's choice has been good but in some cases very poor judges have been so appointed in Colorado. The judges thus appointed for vacancies were not selected by the people and when they ran for reelection if their records were good the tendency of the voters was to perpetuate them in office, unless there was a political landslide. In that event able judges of the other party fell with their ticket.

What alternative does the Judiciary Committee plan offer, in place of our present system? I submit that it offers a more intelligent method of

selection; not by an anonymous group of men with axes to grind but by a group selected for integrity and interest in maintaining an able judiciary—a group known to all interested enough to read the papers. This group in addition to the laymen appointed by the governor to this responsible position includes lawyers selected by *all* the bar. This group, unlike the unnamed powers behind the political thrones, must bear public responsibility for its choices. There is no scapegoat to be blamed if the choice is wrong. The group is balanced as evenly as possible among the political parties; it has no advantage to obtain except such credit as it may receive for a public service well done. The experience in Missouri over seven years has been that none of the nominating commissions has in any instance failed to nominate an able man.

Is this method not a more logical way to choose a judge? A judge should be a man qualified as an expert in a highly complex and technical field. You do not choose your doctor nor your school teacher by popular vote nor leave the selection of them to the county Republican or Democratic committee. Imagine selecting a state sanitary engineer because he is the winner of a popularity contest. Personally I should rather leave the choice of an expert to the men familiar with his qualifications than to have to flip a coin to decide whether to vote for one unknown candidate or another.

Judge Clements says that a judge under the proposed plan would be "beholden to a small group of men." We now entrust the business of filling vacancies on the bench to the governor without any restrictions upon his selection. The plan contemplates that the initial selection be made by men presumably disinterested in politics and interested in the ability of candidates and that the governor then be required to appoint from among the three nominees so selected. A judge selected under the plan would no more be beholden to the governor than to the commission and in neither case as beholden as a present judge is to the leaders of his political party who succeed in placing him upon the primary ballot.

Furthermore, even if friendship should play a part in a judge's selection, under the plan it would have nothing to do with his keeping his job after he got it. The question of his staying in office would be left to the people. It is common knowledge that past favors are not comparable in influence to expected future favors. A judge selected under the plan would be beholden to no one in the future.

Judge Clements suggests that the plan would "perpetuate a judge in office." This is true only so long as the judge's work is good and if it is why should he not be perpetuated in office? I submit that a judge more than any other public official *should* be perpetuated in office until he reaches an age when in the interest of the public and himself he should be retired. There is nothing novel in the observation that many lawyers of the highest caliber and ability refuse to accept a judicial career simply because they dare not take the financial risk, or do not care to become involved in the unpleasant and sometimes degrading experience of political campaigning. Under the present

system a lawyer with ability must surrender a lucrative practice to go upon the bench and assume the risk that later he will be thrown back upon his own resources without clients, not for any fault of his, but because the political winds have changed. It is not easy to build a new practice after years of absence and at a greater age.

Therefore, I maintain judges should be perpetuated in office to the extent that they are assured if their jobs are well done they will not be tossed out in a national political swing. We must avoid the situation described by a former justice of the Missouri Supreme Court, "I was elected in 1916 because Woodrow Wilson kept us out of war—I was defeated in 1920 because Woodrow Wilson hadn't kept us out of war. I do not believe five per cent of the voters of Missouri ever knew I was on either ticket."

One more point—I submit that judges, unlike policy-making public officials, should *not* be too responsive to the popular demand of the moment. The fact that a law is unpopular does not necessarily make it unwise or unconstitutional. Therefore, the judge who must administer the law regardless of public opinion, to my mind, should not be subservient to public opinion.

A word about Judge Clements' second point in criticism of the plan; that is compulsory retirement of judges at age 75. Of course, there are the Holmeses, the Brandeises, and the Hugheses—but they are the exceptions. There are instances within the experience of all of us of Colorado judges who have continued to serve on the bench after senility has overcome their ability to give the proper public service. With the average man intelligence, vitality or interest may decline before the age of 75 has been reached. Those judges over 75 retired under the plan who are still competent to serve may be called upon by the chief justice as the need arises to fill positions temporarily vacated by the illness or death of another judge. Retirement for age could be left, it is true, to the exercise of some board's discretion but the danger with such a plan is that the board would probably not exercise its discretion except in the most flagrant cases. The committee's plan also proposes to give the judicial council power to remove judges who have been mentally or physically disabled from further service. At present there is no such remedy in our law.

At the close of his article, Judge Clements mentions those reforms which he regards as desirable. Six of the seven changes which he advocates are in the plan, and his seventh one requires judges to run as non-partisans instead of against their record! Of the other features of the plan Judge Clements states that they are "Impractical, radical and unsatisfactory." All of the features of the plan were arrived at by scores of men after more than a year of work, after exploring every field for evidence and information, including all constructive criticisms from the Colorado bar. It seems hardly justifiable that so much work, effort and open-mindedness should be tossed aside by such general words, "impractical, radical and unsatisfactory." Whether they are impractical or not will only be determined by practice; if radical means a departure from the past then indeed they are radical. At the annual conven-

tion they proved satisfactory to three lawyers out of every four.

What do the remaining features of the plan contemplate? First, an integrated court with the chief justice selected for his ability as an administrator to act as a true president of the court. Second, the assurance that so far as possible judges shall be qualified lawyers who know the rules of their business, shall stick to their jobs and keep out of politics and that the chief justice may keep those judges not busy at work. Third, that a judicial council shall be created to study constantly improvements in the laws and procedure and the business of the courts. Fourth, to avoid a present ridiculous procedure of double trials in contested matters in the county court. Fifth, to get rid of the worst stigma of our judicial system, the justice of the peace courts, and place their jurisdiction with able and trained men, namely the county judges, and under magistrates selected by them and under referees appointed by them.

These represent changes and to some all changes are radical. The real question is, is our present system cumbersome and unsatisfactory? Ask the average layman and he will tell you.

"Equal Justice Under Law"

By WAYNE C. WILLIAMS

Of the Denver bar; former Attorney General of Colorado; former Special Assistant Attorney General of the United States.

The truest and best forum for the lawyer is an appellate court in which he can make an oral argument for the rights and interests of his client.

Here is the natural forum for a lawyer and here his forensic talents should show in their highest form.

The court ought to be as anxious to hear a lawyer argue his case orally as the lawyer is to present it.

I have always felt that there was the essence of real wisdom and practical sense in that custom of the United States Supreme Court in ordering oral arguments in practically all cases that come before it.

There seems to be no deviation from this rule of oral argument in all the long history of that greatest of all our courts and state appellate courts may well take a lesson from this wise custom. It is pleasant to note that our own state supreme court is hearing a progressively larger number of oral arguments in recent years.

I undertake to say that there is no satisfactory substitute for an oral argument before an appellate court. The printed brief never can give to a court that clear, full, consideration of the facts and issues of a case that oral arguments make possible. The oral argument clears the air; eliminates dubious theories, extraneous facts and matters and enables the judges to acquire the very best and clearest grasp of what the exact matter in dispute may be. A printed brief may or may not effect this result.