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David R. Mason's statement on the Montana Plan

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STATEMENT BEFORE THE JUDICIARY COMMITTEE OF THE MONTANA CONSTITUTIONAL CONVENTION

By David R. Mason

I shall talk about administration under the "Montana Plan," with special reference to the administration of the judicial system at the supreme and district court levels.

Need for court administration: present provisions

When we talk about the "Montana Plan" we talk about a unified court system - a system designed to work efficiently in Montana, with our sparsely populated and remote areas, avoiding unused or unnecessary judicial machinery and personnel and yet affording ready accessibility to the public. Business like management and coordination of services under self-contained centralized authority is essential to a modern judicial system.

This concept finds expression in our present Constitution. Thus, Article VIII, sec. 2, provides that the Supreme Court "shall have general supervisory control over all inferior courts, under such rules and limitations as may be prescribed by law." This latter clause has little practical significance, since it does not permit the legislature to decrease the power granted to the Supreme Court, and the legislature has never undertaken to prescribe the procedure or time for its exercise.

Under this general supervisory control, the Supreme Court may mandamus a judge in a single judge district to perform his duties and, if he fails to do so, may order a judge from another judicial district to perform those duties. Further, the Supreme Court may apportion business among district judges of a multiple judge district, if they fail to make their own apportionment.

But the trouble with the present Constitution is that it does not provide for integral, continuous administrative control or supervision by the Supreme Court of the court system. The fact is that the present supervisory power of the Supreme Court operates principally to keep inferior courts within their respective jurisdictions and prevent abuses of such jurisdictions in individual cases.

There is no provision contemplating the collection and compilation of data respecting court facilities and personnel, systems used by clerks of court and probation officers, fiscal requirements, and the like. There is no provision for an administrator to aid the Supreme Court in its supervisory functions. There is no power whatever to divide the state into districts, or determine the number of judges for each district. The latter powers are expressly placed in the legislature.

I cannot say that there is any devastating consequences of these inadequacies at present. Our courts are current on cases before them. But as the population of the state increases, judicial congestion and consequent delay in the administration of justice may be expected to become a problem, as it has in other states.

And we do not have a well balanced judiciary. The population of the 18 districts varies greatly, one having about 12 times that of another; and the area also varies greatly, one having more than 30 times the area of another. The number of district judges varies from 1 to 3 in the districts, but this does not equalize caseloads. A study made in 1966 showed that the per judge caseload in one district was more than 4 times that in another.

The system operates because judges in districts with lighter caseloads have been willing to assume jurisdiction of cases outside their own districts when asked to do so. But we certainly should not depend upon

a system of voluntary equalization. Our cooperative judges will not live forever, and no one can foresee the attitude of their successors.

Of course, figures on population, areas and judge caseloads do not tell the whole story, because,among other things, they don't take account of the type of case handled in the different districts. But I have never known of any effort to evaluate the differences in types of cases, and I don't think anyone knows exactly what part the type of case may play in the real per judge caseload.

The fact is that machinery for such evaluations simply does not exist. Our present districting and allotment of judges is the result of infrequent legislative determinations to meet the complaints and demands of particular districts. There is no continuing or overall study or supervision of such matters, to assure a judicial system which will efficiently deliver justice throughout the state.

No constitution can provide detailed rules to accomplish an efficient judicial system geared to meet changing requirements. But a state constitution should provide the framework for such a system, and I believe the provisions of the "Montana Plan" do this. Let's look at these provisions.

Provisions in the "Montana Plan"

Section 2 of the "Montana Plan" carries forward the present provision for supervisory control by the Supreme Court and adds "administrative" control. This makes it clear that the power of the Supreme Court is not confined to supervision of the decision making process, but extends to the management of the court system. The next section (3) provides that the Supreme Court may appoint an administrative director and staff, who shall serve at the court's pleasure, to assist

the court and the Chief Justice in the performance of administrative duties. Then section 4 empowers the court to make rules and regulations relating to judicial administration. Note that these powers are permissive and not mandatory. The various and complicated problems involved in court administration require continuous and comprehensive study which the court may not be able to do without assistance. The provisions permitting the appointment of an administrator and staff are aspects of self-contained centralized authority.

Some major problems in the management of an efficient court system, to which I have referred, are identified in other sections. Section 10 deals with the districting of the state and the determination of the number of judges in each district. You will note that this provides for initial legislative action. But the Supreme Court may increase or decrease the number of judges in any judicial district and divide the state into new districts, provided that each district be formed of a compact territory and be bounded by county lines. Any contention that too much power would be lodged in the Supreme Court is met by the provision that the legislature may reject changes in districts and the number of judges therein at the legislative session following the change. Further, the changes could not take place more frequently than every 4 years.

Section 9 also should be noted in this connection. Under it, the judge or judges of each district may provide for divisions and assign judges to particular types of cases. Specialization as the volume of business permits in such areas as, say, juvenile delinquency proceedings and small claims litigation, is thus possible. And again, there is a safeguard against the creation of divisions where not justified, in the requirement of approval by the Chief Justice of the Supreme Court.

To aid in these areas of administration and assure a wide representation of views, the "Montana Plan" also provides for continuing studies by a committee composed of laymen as well as lawyers and judges. Section 13 provides that the Research and Qualifications Committee shall conduct continuing studies of the administration of justice in Montana, which studies shall include, but not be limited to, the division of the state into judicial districts and the number of judges to be assigned to each. This broadly based committee would report to the legislature as well as to the Supreme Court, as the legislature might require.

All in all, we have in the "Montana Plan" provisions for a flexible, balanced and efficient system of justice. The Plan is geared to future needs as well as present requirements, as an enduring framework of government should be.

Conclusion

Today only 13 states remain without express grant of administrative control to their highest court, and 17 have made the power constitutional. It is time for Montana to act.

Part II - Procedural rule making power

Now I should like to turn to a related but different matter. I should like to say a few words about the power of the Supreme Court to make practice and procedural rules to govern cases tried in our courts of record.

These rules are the legal instruments for getting substantive issues before the court for adjudication. No other department or agency of government has the thorough knowledge and experience which equips it to make such rules.

Section 4 of the "Montana Plan" provides that the Supreme Court has the power to make rules and regulations, not only relating to judicial administration, as to which I have spoken, but also relating to practice, procedure, pleading and evidence.

In 1959 the Montana legislature gave the power to our Supreme Court to make rules relating to practice, procedure and pleadings in civil cases, provided that the rules should be effective upon adoption by the legislature. Then in 1963 the legislature removed the proviso. The Supreme Court has exercised the power ever since. On the criminal side, the power was granted in 1967 but expired in 1969.

The provision in the "Montana Plan" is somewhat broader in language than these statutes, in that it includes the power to make rules and regulations respecting "evidence." But rules of evidence really are an integral part of rules of procedure. This is recognized on the federal level. A federal enabling act gives to the Supreme Court of the United States the power to make rules relating to "practice and procedure," and under this the Federal Advisory Committee has regarded rules of evidence as matters of procedure, and rules of evidence for the federal district courts are now being considered by the United States Supreme Court.

Section 4 of the "Montana Plan" makes this specific, to avoid any doubt as to what is included.

Objection is occasionally heard that procedure and substance can't be distinguished, and that substantive rules should be left to the legislature. It is true that the line between procedure and substance is sometimes rather shadowy, and I certainly do not think that the court should have the power to make rules of substantive law.

But I don't think there is any real danger of this happening under the provision of the "Montana Plan." Experience with procedural rule making power for more than 30 years on the federal level, and for more

than a dozen years in Montana, has not shown this to be a significant problem. Actually, the problem has existed ever since the beginning of the federal judicial system. This is because in cases where federal jurisdiction is based on diversity of citizenship, and in some other cases, the federal court follows the substantive law of the states while applying federal procedural rules. The fact is that a good body of jurisprudence has grown up on the distinction between substance and procedure.

We are not in an untried or dangerous area. In some states the power to make procedural rules is regarded as inherent in the highest court of the state. It is granted by the constitution in 15 states, and by statute in 22 more.

Section 4 of the "Montana Plan" would remove any doubt as to where the power rests in this state. It would place the power in the Supreme Court, which has the knowledge and experience enabling it to make these technical legal rules. And it would permit ready adjustment of Montana procedural rules to those applicable in federal courts, thus permitting uniformity between the procedures applicable in our state and federal courts.

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