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Charles B. McNeil's statement on the Montana Plan

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MONTANA CONSTITUTIONAL CONVENTION
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Judiciary Committee
Constitutional Convention
State Capitol Building
Helena, Montana 59601

Dear Ladies and Gentlemen:

In response to your request that I provide in writing the comments which I made in testifying before your committee on January 27, 1972 the following summary is submitted:

RECOMMENDATIONS

First I would like to state that in general I support our present Constitutional article on the judiciary, particularly in its system of elective judges at all levels from the supreme court through the district court and including the justice of the peace courts.

I certainly appreciate the efforts and join with those who wish to upgrade justice in the state of Montana particularly at the lower court level, however I view it as primarily an economic problem. The supreme court and district judges must be paid substantial salaries while in office and quality and competency of the justice level of courts will be directly related to the compensation provided.

Specifically I recommend retaining the constitutional dignity of an elective justice of the peace court level.

However, I believe that we must remove the constitutional requirement of two justices per township and rather should authorize and direct the legislature to establish as many justice of the peace courts and in such location as they deem proper.

In order to provide flexibility I likewise believe that the constitutional limitation of the jurisdiction of the justice courts ought to be removed and that left to the legislature. This, of course, would permit the legislature to accomodate and provide a justice level court system which would be flexible enough to meet the demands of our rural population areas and be variable enough so that the legislature could satisfy the demands of our larger cities.

I likewise believe that the legislature should be authorized and directed to set minimum standards of education training and salary and whenever possible provide office space in the court house commensurate with the number and locations of the justice courts to be established.

In addition I believe that it is essential to preserve the right of appeal from a justice of the peace court determination to a district court which is far less costly and far more practicable than the requirement of the Montana plan, which I will discuss next, and which plan would require that the only appeal from a magistrate level decision would be to the Supreme Court of the state of Montana.

MONTANA PLAN

Because this committee has before it a proposal which would substantially change our present Montana Constitution relating to the judiciary I will comment on my impressions in studying this plan from the point of view of my capacity as a practicing small town Montana attorney.

My fundamental objection to the Montana plan is that in my opinion it violates the basic principles of our United States Constitution which guarantees, in Article IV, Section 4, a republican form of government which of course is a form of government whereby the people are governed by those whom they choose. The basic structure of the Montana plan substitutes an appointive judiciary selected by an appointive committee for our present constitutional system of electing judges by the people.

Under our democratic form of government I believe that those who propose change have the burden of persuading those to whom the changes are proposed of the validity of their proposal. I strongly believe that there is no justification for taking away the peoples right to vote and substituting therefore an appointive system.

In reviewing the Montana plan I find many areas where the new proposed system would be subject to abuses that are not possible under our present system; I am not, I emphasize, indicating that powers contained in the Montana plan would be abused, however, I feel obligated to point out those areas in which there are substantial differences from the present system.

Section 2 of the Montana plan grants to the supreme court general supervisory and administrative control over all inferior courts. The Montana Supreme Court presently has general supervisory control which of course means that the Supreme Court can direct a district court to refrain from doing something which it ought not to do or to direct a district court to do something which it ought to do. However the addition of administrative control

over the district court presents the opportunity for substantial changes in power from our present system. The comment to Section 2 states that the addition of administrative control as well as supervisory control makes no substantial change and with this I disagree strongly. The administrative power of Section 2 could enable the supreme court to assign district judges anywhere in the state at their desire. Both Dean Sullivan of the University of Montana Law School and Mr. Bill Bellingham, President of the Montana Bar Association, testified before this committee that inherent in the plan is the power of the supreme court to administratively assign district judges anywhere that the supreme court desire. This administrative power could be abused in such a manner as to permit a supreme court which should happen to desire to remove a particular district judge the ability to do so by simply assigning him from one end of the state to the next and insuring that he would never be reassigned to his residence. More importantly, should a district judge feel that the administrative power were being abused a district judge would have no appeal other than that to the same "administrative" authority which he felt was abusing its power.

Section 3 of the Montana plan authorizes the supreme court to appoint an administrative director. This could result in an appointive administrator exercising substantial authority over the judiciary of Montana. That this is not merely an idle suspicion on my part is illustrated by information contained in a report by Dean Sullivan to the Citizens Conference plan for improvement of the Montana judicial system at Billings, Montana, on December 7, 1971. That report refers to a recent report by an advisory commission on intergovernmental relations dealing with state local relations in the criminal justice system. That report further recites that some of the recommendations of that committee are apropos to the Montana plan. The commission further recommends that all courts be subject to administrative supervision and that all states provide an administrative office of the state courts headed by a professional administrator. To me this certainly sounds like the administrative director as referred to in the Montana plan and when considered with the proposed administrative control as set forth in Section 2 would give an appointive administrative official substantial control and power over the district courts of this state which I believe to be fundamentally wrong.

Section 4 grants to the supreme court the powers to make rules of evidence which shall have the force of an effective law. It is a substantial change from our present system whereby the elected legislature enacts rules of evidence by statute and amounts to a substantial violation of the democratic doctrine of separation of powers. Rule 4 would give the supreme court the power to legislate by making the rules of evidence now reserved to the legislative, the executive power of enforcing the rules, as well as the judicial power of interpreting the rules.

Section 6 of the Montana plan would permit the legislature to increase the number of associate justices to six and which power could be abused by a legislature to impose its legislative philosophy upon a court which at any particular time might be evenly divided in its philosophy.

Section 7 of the Montana plan changes the Clerk of the Supreme Court from an elective state official to an appointive position. Again this is taking away from the people of Montana the right to vote for their public officials.

Section 9 of the Montana plan provides for the creation of the position of magistrate. Although the creation of each magistrate position by a district judge would initially have to be approved by the Chief Justice of the Supreme Court, after each respective magistrate's position is created the Montana plan could be subject to abuses. Section 9 provides that the appointing judge will establish the compensation of magistrates appointed by him with the apparent limitation being only the imagination. Section 9 further grants magistrates full jurisdiction of the district courts in all matters excepting only criminal cases amounting to felonies. The district judge under this system could quite simply appoint a magistrate, fix his salary at $75,000 per year and then give to that appointed magistrate all civil, probate, and misdemeanor criminal cases reserving unto the district judge only the trial of felonies. The comment to Section 9 refers to the exercise of a limited portion of the district courts jurisdiction, but the section itself is unlimited in its grant of jurisdiction excepting only felonies.

Section 10 of the Montana plan would enable the supreme court to increase or decrease the number of judges in a judicial district and to redistrict the state subject only to rejection by the next succeeding legislature. This power to increase the number of judges and determine their locations presently rests with our elective legislature which is where that power properly belongs.

Section 11 of the Montana plan changes the clerk of the district court from an elected public official to one appointed by the district judge. The clerk of the district court provides substantial public services other than acting as clerk for the district judges while court is in session. In addition Section 11 provides that deputy clerks are likewise appointed by the judge which would have the effect of having them come directly underneath the district judge rather than the clerk for whom the deputies presumably work. The comment to Section 11 simply recites that this section follows the pattern of appointment to which I would add, in lieu of election by the people.

Section 12 of the Montana plan refers to certain qualifications for magistrates and permits the appointment of non law qualified

persons to the position of magistrate. This system works quite well under our present justice courts which of course have limited jurisdiction; however the Montana plan would permit magistrates without any legal training to have full unlimited civil, probate, and misdemeanor trial jurisdiction excepting only the trial of felonies.

Section 12 further provides that district judges and magistrates need not be residents of the districts for which they are chosen at the time of their appointment and requires only that they shall reside in the district for which chosen. This could permit all future judges and magistrates in the state of Montana to come from a single city or location or permit a rotation system of choosing judges from the major population centers of the state without any regard for the area in which a vacancy occurs and without any opportunity for the people who will come under the judicial jurisdiction of the particular judge to express their views. In addition Section 12, although it requires a judge to reside in the district for which he was chosen, does not necessarily mean the district to which judge will be assigned for his judicial duties by the supreme court. For example this section, combined with the administrative powers in Section 2, could permit a district judge to be appointed from Missoula to fill a vacancy in Butte and, providing the judge established a residency in Butte, he could thereafter be assigned to judicial duties back in Missoula.

Section 13 of the Montana plan provides for the creation of a non-partisan judicial council in a manner to be provided by the legislature. This initially at least has the appearance of having some safeguards as the judicial council would be selected by the elected representatives of the people. However after the judicial council is elected under the Montana plan the judicial council is then directed to appoint two committees, a nominating committee and a research and qualifications committee neither of which committee would have to be composed of any members of the judicial council and the Montana plan provides no minimum requirements or qualifications for selecting members of these two committees other than restricting the membership to be non-legislative, executive or judicial officers. The nominating committee for example could be all of one political persuasion or all from one geographic section of the state and thereafter would have full power to nominate all future judges in the state of Montana. This appointive committee under the Montana plan can nominate two and nor more than four nominees for judgeships and from which list the governor would be required to select the judge. This of course as a practical matter permits the nominating committee itself to select a judge by simply nominating one person whom they would desire to be the judge followed by three nominees of limited standing in their bar or community.

Said Section 13 likewise refers to an uncontested general election for the retention or rejection of a judge who desired to remain in office. A distinguished attorney in Polson, Montana, Mr. Floren Hamman, who was practicing law before I was born has compared this to the Russian system of elections whereby only one name appears on the ballot. I cannot believe that any district or supreme court judge would ever be removed on a ballot where there was not a competent judicial candidate in opposition to the incumbent. Under the Montana plan if there should happen to be an incompetent judge seeking reelection I simply cannot believe that any lawyers or citizens of good standing in any community would walk up and down main street campaigning against an incompetent district judge and asking the people to vote against him. As contrasted by the present system if there should happen to be an incompetent incumbent judge seeking reelection the members of the bar and community can and will campaign in favor of a qualified candidate running in opposition to the incumbent.

The research and qualifications committee provided for in Section 13 constitutes a complete destruction of our doctrine of separation of powers in that it gives this appointive committee power to investigate, which is an executive prerogative, power to determine the basis for retirement censure or removal, which of course is a legislative function and the power to conduct hearings subpoena witnesses and which proceedings are of course judiciary in nature. The section goes to extreme lengths to provide virtually unlimited power in an appointive committee to review the qualifications and recommend the removal of judges but no-where in the Montana plan is there any power for the people of Montana or any elected officials to investigate or remove the "committee" which need not have any qualifications and for which no provision for removal or review are made.

The comment to Section 13 states that its purpose is to provide a merit system of selection and retention and relieve justices and judges from political pressures. Under our present Montana system I would like to think that election by the people is a system of merit selection and the only political pressure upon a present candidate for the judiciary is to persuade the voters that he would be a competent judge. Under the Montana plan political pressure might well be shifted away from justices and judges and concentrated instead upon the "committee". The comment to Section 13 further provides that the plan is designed to protect against continuance in office of any incompetent or unethical judge which I submit is now done by the elective process rather than the committee system which would be its substitute under the Montana plan.

Section 15 to the Montana plan as an addition to our present provisions would permit mileage, per diem and salary which

could of course encourage a centralized magistrate system in the larger population centers with traveling magistrates to administer justice in lieu of our present resident justices selected by the people in the districts served.

Section 17 of the Montana plan of ourse contains a "grandfather clause" by permitting incumbent supreme court justices and district court judges to remain in office unless rejected, removed or retired by the research and qualifications committee provided in the Montana plan.

In concluding my specific comments about the Montana plan I would like to again refer to the report given by Dean Sullivan at Billings and apply the criticisms there in made to our present system and show how they are more applicable to the Montana plan.

Dean Sullivan states that there is a simple answer to the objection that the selection of judges should not be taken from the people and that is the people don't have an effective voice now. I submit that the people won't have any voice under the Montana plan as the entire power to elect and retain judges lies within an appointive committee over which no one has control.

The criticism is then made of our present system that four or five justices of the supreme court were appointed initially and that nineteen of our 28 district judges were appointed initially. This ignores the fact that under the Montana plan all will be appointed and further ignores the fact that obviously one of the five justices of the supreme court and nine of the twenty eight district judges were initially chosen by election by the people and which right would forever more be barred by the Montana plan. Further criticising the present system Dean Sullivan recites that district judges have run for election and have been elected in most instances. This of course ignores the most recent general election held in November of 1970 in which an appointive judge in the fifth judicial district ran for reelection, was opposed by another member of the local bar, and the appointed incumbent was defeated in an election in which the people of that district exercised their right to vote and determine who will be their judge.

Further commenting on Dean Sullivan's criticism of our present system he states that we presently have an appointed judiciary with no limitation upon the governor. I apply that criticism to the Montana plan in which we would have an appointive judiciary with no limitation upon the "committee". Dean Sullivan states that under the present plan the governor is not required to seek the advise or counsel of any one and that he may appoint anyone he wishes without determining the status of that individual or determining the judicial demeanor or

temperment of that individual. Under the Montana plan the "committee" is not required to seek the advise or counsel or anyone and the "committee" may appoint anyone they wish likewise without determining the status of that individual or determining the judicial demeanor or temperment of that individual. Criticism of our present plan is further extended to state that there have been few contested elections and fewer instances where judges have been turned out of office to which I reply that the likely reason is that we have a distinguished judiciary in the state of Montana and under the Montana plan there would be no contested elections and none would be turned out of office.

The objection to our present system is continued by stating that our present system of impeachment is unworkable and that the unfitness of a judge, where it exists, seldom is a matter of common knowledge. My reply to that is that although impeachment may be unworkable it affords a better opportunity that the Montana plan of running unopposed and if the unfitness of a judge under the present system is seldom a matter of common knowledge it will not be more a matter of common knowledge under the Montana plan and is evidence in itself that it is extremely unlikely that any judge would ever be defeated in an uncontested election. The third objection recited by Dean Sullivan to the present judicial article is that it is contrary to the facts when it is stated that the present organization of our courts is adequate and working well. I submit that this is not true. The supreme court of the State of Montana is undoubtedly more current in holding its hearings and rendering its decisions than at any prior time in history and it is at least the equal to any supreme court in the United States. The district courts likewise are current and effective and should there be any isolated instances in which the case load exceeds the capacity of the resident judge provisions are made in our present system whereby the elected representatives of the people, the legislature, can create additional districts or additional judges to be elected for existing judicial districts.

Dean Sullivan further criticizes the present judicial system by stating that there presently is no direct citizen participation. I strongly believe that our present system of electing judges is the most direct means of citizen participation possible. The final objection to the present plan has merit and as I've indicated at the beginning of my recommendation I heartily agree that justice court level of our judiciary should be upgraded as I have suggested. I heartily disagree that it is necessary to take away from the people their right to vote for those whom will administer their justice and replace that system by appointment by committee.

In conclusion I would like to quote from a newspaper article in the Daily Missoulian of January 6, 1970 in which Montana District Judge E. Gardner Brownlee was referring to his efforts to conduct training sessions in an attempt to upgrade the level of our justice of the peace courts. Judge Brownlee was therein quoted as saying "Dean Sullivan recently referred to

our efforts as a band-aid on a broken leg . . . . His remedy for the broken leg is complete amputation."

I would add that the Montana plan offers a transplant in which the new limb is controlled by a committee rather than the body it is supposed to support.

Respectfully submitted,

C. B. McNeil
Delegate - District 17