REPORT OF THE COMMITTEE ON JUDICIAL ELECTIONS

(1904)

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FOREWORD

By

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Editor, MLHP

On October 13, 1857, voters in Minnesota Territory approved the new state's constitution, Article 6, §3, of which provided for the election of the supreme court:

> **SEC. 3. The judges of the supreme court shall be elected by the electors of the state at large, and their terms of office shall be seven years and until their successors are elected and qualified.**

The moment this passed, politics in its many forms entered the process of judicial selection; although it may be more accurate to say that politics was *retained* because antebellum presidents, without exception, had rewarded political supporters with seats on the territorial court.

The decision of Minnesota's competing constitutional conventions to provide for an elected judiciary was not unusual. Between 1846 and 1860, twenty-one state constitutional conventions were held, and nineteen approved constitutions that provided for elected judges.[1]

Reviewing the literature, Kermit Hall identified two explanations for this "paradoxical" development:

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[1] **Kermit L. Hall, "The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860," 45 *The Historian* 337 (1983); see also Jed Handelsman Shugerman, "Economic Crisis and the Rise of Judicial Elections and Judicial Review," 123 Harv. L. Rev. 1061 (2010); also available on SSRN.**

> This transformation in the method of judicial selection immediately preceded a surge in judicial power by state appellate judges. "It is one of the paradoxes of our legal growth," James Willard Hurst has concluded, "that the most basic assertion of the people's control of the courts [through the popular election of judges] came at the threshold of the greatest period of judicial power in our history." Other scholars have echoed Hurst's contention.
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> Two explanations have been offered to explain this seeming paradox. First, most scholars have insisted that emotion prevailed over reason. Hurst, for example, attributed the delegates' motivation in adopting popular election of judges to an unthinking "emotional response" rooted in the "resistless demand" of Jacksonian Democracy. This view assumed that popular election of judges constituted a radical measure intended to break judicial power through an infusion of popular will and majority control. ….Second, another interpretation insists that expediency rather than radical disdain of the judiciary prompted the adoption of popular election. Political "outs" maneuvered to strip partisan opponents of valuable patronage. In this view, neither Whig nor Democrat delegates seriously contemplated the impact of popular election on the exercise of judicial power.[2]

Hall advanced an alternative thesis to these "neat dichotomies of radical Jacksonian Democrats and conservative Whigs," which he believed ignored the "overwhelming role of lawyer delegates in the conventions." "In every [state constitutional] convention, lawyers and judges of both parties for whom the method of judicial selection had personal and professional significance, controlled the committees on the judiciary," he wrote, adding "They also dominated debate over the issue once it reached the full conventions." [3] To Hall, lawyer delegates sought popular elections to

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[2] Hall, supra note 1, at 339-40 (citing sources).
[3] Id. at 342.

strengthen the judiciary. He summed up his thesis:

> **The decision to elect state court judges was neither emotional nor expedient. It was an essentially thoughtful response by constitutional moderates in the legal profession to ensure that state judges would command more rather than less power and prestige.[4]**

Associate Justices Moses Sherburne, Bradley Meeker and Charles Flandrau of the territorial supreme court were delegates to the constitutional convention, but whether they and other lawyer-delegates dominated the drafting of Article 6 is a subject that, like so many others in the legal history of the state, waits an author.

Unlike delegates to other antebellum state constitutional conventions, Minnesota's were chosen in the immediate wake of *Dred Scott v. Sanford*, 60 U. S. (19 How.) 393 (1857), announced on March 6-7, 1857. The delegates to Minnesota's constitutional convention were elected on June 1, 1857, and the convention convened the following month. Excerpts from Chief Justice Taney's opinion were published in Minnesota newspapers, and it was the subject of many hostile editorials. It was in the tense environment created by this ruling of judges who had been nominated and confirmed and served for life, that Article 6 was framed. [5]

In the decades after statehood, the Minnesota Supreme Court acquired power and prestige.[6] And justices continued to undergo

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[4] Id. at 354.

[5] During the convention, the *Minnesota Republican* endorsed an elected judiciary, and made an oblique reference to the *Dred Scott* controversy, while quoting Jefferson: "'Judges,' said he, 'are as honest as other men, and no more so;' and he further argued that the tenure by which they held their office would not save them from the bias of partisan influences—of which we have a lamentable instance in the present degradation of the Supreme Court of the nation.'" *Minnesota Republican*, July 9, 1857, at 2.

[6] In my article, "Advisory Opinions of the Territorial Supreme Court, 1852- During the convention, the *Minnesota Republican* endorsed an elected judiciary, and made an oblique reference to the *Dred Scott* controversy, while quoting Jefferson: "'Judges,' said he, 'are as honest as other men, and no more so;' and he further argued that the tenure by which they held their office would not save them from the bias of partisan influences—of which we have a lamentable instance in the present degradation of the

periodic popular review.[7] By the beginning of the next century, however, influential members of the state bar association had come to believe that selection by popular election was harmful to the state judiciary. At its annual convention in 1903, the association requested its Judicial Election Committee to study the process and make recommendations to improve it.

The report of the five-member committee was delivered to the Minnesota State Bar Association at its convention the following year. After J. O. P. Wheelwright read the Committee's Report and Recommendations, a lively debate ensued, during which amendments were offered to the Report. In the end, its recommendations, as amended, were endorsed by the convention.

The debate on the Report of the Committee on Judicial Elections was recorded on pages 10-19 of the published *Proceedings of the Minnesota State Bar Association, 1904*, and the Report itself appeared in Appendix E on pages 67-9. The Report and subsequent debate are reprinted in their entirety below. They have been reformatted. Punctuation and spelling are not changed.

Supreme Court of the nation.'" *Minnesota Republican*, July 9, 1857, at 2.1854" (MLHP, 2009), I noted that, with one exception, territorial court justices provided advisory opinions to the territorial legislature when requested; whereas, after statehood, the justices, now elected by the people, initially declined but eventually, in an exhibition of power and self-confidence that the territorial court lacked, declared the advisory opinion law unconstitutional in *In the Matter of the Application of the Senate*, 10 Minn. 78 (Gil. 56) (1865).

[7] Article 6, §3, was amended in 1883 to reduce term lengths to six years. In 1876, an amendment was ratified that provided for the lieutenant governor to appoint judges to the court to hear a case when incumbents were disqualified for conflicts.

REPORT OF COMMITTEE ON JUDICIAL ELECTIONS

HON. FREDERICK V. BROWN, President Minnesota State Bar Association.

***Dear Sir*: The Committee on Judicial Elections appointed by you pursuant to a resolution adopted by the State Bar Association at its last annual meeting, beg leave to report.**

Your committee have appreciated the importance of the matter so submitted to them, and that not only the Bar but the people at large have a deep interest in anything which will tend to secure men of the highest qualifications for judicial office. We are all agreed that such is not the tendency of our present methods, and that under existing laws it is becoming more and more difficult to secure such men, or to retain them long in office.

It is unnecessary to point out at length the evils of our present system, as they are fully understood and appreciated by both Bench and Bar. The important question is, in what manner or by what system may these evils be corrected?

To this end, your committee have given the matter careful consideration. Appointment of judges by the Governor seems to us impracticable, however much may be said in its favor, for a constitutional amendment would be necessary to effect such end, even if desirable, and this is out of the question. The people will not surrender the right enjoyed by them of selecting judicial as well as other public officers.

Separate judicial elections strongly appealed to us. This has long been the method of selecting both Supreme and Circuit Court judges in the state of Wisconsin, and has proved an unqualified success, securing to that state as it has a judiciary of the highest character. This system we would unhesitatingly recommend, were it not for the fact that it seems to us very doubtful whether this can be brought about without a constitutional amendment, and it will not do to adopt any plan in respect to which such doubt exists. To secure such amendment involves delay, aside from the fact that it would meet much opposition because of the large additional expense incidental to a separate election held throughout the state. This consideration alone would render it difficult to secure the submission to the people of such an amendment in the legislature, and to secure its adoption by the people would, for the same reason, be still more difficult.

In view of the limitations so affecting the question, no radical change in the selecting of our judges seems possible. We are satisfied, however, that the evils sought to be corrected are largely due to the present system of judicial

nominations. Whatever excellence the primary law may possess in respect to other offices, its effect upon the judicial office is harmful in the extreme. Only men of the highest character, training, ability and knowledge of the law are worthy of such office. The people at large have little knowledge respecting the qualifications so required, or the fitness of candidates for such position. The people, however, may be trusted to select delegates competent to make suitable selection of candidates for judicial office. We therefore recommend that candidates for such office be named by a judicial convention called for the purpose. In such convention the legal fraternity of right should and doubtless generally would predominate, and in that way our judges would be selected by men best fitted to pass upon their qualifications. It would not infrequently happen that the conventions of the several parties would agree upon the same man, or in case more than one are to be chosen, selections would be made from each of the predominant parties of the same candidates by the respective conventions, and thus there would be no judicial contest at the election, thereby securing a non-partisan judiciary. This frequently occurred under the old convention system, before the enactment of the primary law, with the most satisfactory results, effectually taking, as it did, the judiciary out of politics and securing the continuance in office of tried and efficient judges. Under such conditions practitioners of the highest standing would not be so reluctant to enter the public service, as it would insure to them reasonable certainty of permanence in office. As a further inducement to this class of men, in case a return is made to the convention system of nominating judicial candidates, we recommend an increase in the salary paid to our judges so that it shall be somewhat commensurate with the incomes enjoyed by the able and successful members of the profession. A judge generally is without income or means of support other than the salary attached to his office, and this should be not only sufficient for the comfortable maintenance of himself and family, but should enable him to accumulate as well, in a moderate degree, against the time when he will be incapacitated to care for himself and those dependent on him. It is not an infrequent occurrence in this and other states for our ablest judges to retire from the Bench because the salary is inadequate to afford a comfortable support.

In view of these and other considerations we submit the following recommendations by way of reforming our present judicial system and elevating the character and tone of the state judiciary:

1. Remove the nomination of judicial candidates from the operation of the primary law and let the same be effected by means of judicial conventions;

2. Fix the salary of the judges of the Supreme Court at the sum of $7,500.00. Fix the salary of the Judges of the District Court in at least the two Districts in which are the cities of St. Paul and Minneapolis at the sum of $6,500.00, and in all other Districts at the sum of $5,000.00 Such increase of salary to be

conditioned on the removal of the judiciary from the operation of the primary law, and all salaries to be paid by the state. *

To effect legislation along these lines the president of the Bar Association should be authorized and directed to appoint a large committee representing all the districts in the state whose duty it shall be to bring the matter to the attention of the legislature, drafting and presenting such laws and amendments as may be necessary in the premises, with power to appoint sub-committees to wait upon the proper legislative committees and in other ways exert their influence and put forth their best efforts to secure the legislation desired.

All of which is respectfully submitted.

CHAS. E. OTIS,
GEO. P. FLANNERY,
J. O. P. WHEELWRIGHT,
C. A. FOSNES,
AMBROSE TIGHE,
Committee.

March 10th, 1904.

*** This paragraph was amended so as to contain the recommendation that the salaries of the district judges be increased to five thousand dollars per year uniformly through the state should be paid by the state. [Footnote in original text]**

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After this Report was read to the convention, a debate ensued:

In behalf of the Committee on Judicial Elections, Mr. J. O. P. Wheelwright read the report contained in appendix E

MR. WHEELWRIGHT: This report has been prepared by the Chairman of the Committee, Judge Otis, of St. Paul, and has been unanimously concurred in by all members of the committee.

MR. CARROLL: I move that the report be accepted.

THE PRESIDENT: **That will be taken as the sense of the meeting, unless objection is made.**

MR. JOHN DAY SMITH: **I would like to ask Mr. Wheelwright how many times in the past twenty years there have been non-partisan nominations for the district bench in this judicial district, and how many times in the last twenty years there have been non-partisan nominations for the supreme bench.**

Now, as between nominations under our primary law and those by political convention, I prefer the primary system. If there can be absolutely non-partisan nominations for the judiciary under the convention plan, as recommended by the committee, I am in favor of that proposition; but if we judge of the future by the past, that probability is very remote.

In regard to salary: I admit that the judges of the supreme court are inadequately paid. The chief justice of the United States Supreme Court receives $13,000 per year; the Associate Justices, $12,500; the Circuit Judges, $7,000; and the District Judges $6,000. The recommendation of the committee raises the salaries of the supreme judges of this state above the amount the United States Circuit Judges receive. I think that is not a proper recommendation. I am opposed to it. It places, for instance, the judges of this judicial district upon a salary of $6,500, whereas the judges of the district courts of the United States receive only $6,000. Possibly our enthusiasm for elevating the bench—to say nothing of the bar— may carry us off our feet and lead us to make recommendations beyond what the bar should endorse and assuredly beyond what the people will endorse.

MR. ROME G. BROWN: **It does not seem to me that because any of the United States court judges are underpaid that our judges should continue to be underpaid. As I understand it, the judges of the New York Court of Appeals receive $17,500. The appellate judges of most of the other states receive salaries far above the figures recommended by the committee. No business concern, corporation or individual, can secure the exclusive services of a thoroughly efficient, safe and reliable attorney for $5,000 a year, nor for $6,000. When put upon the bench, a judge has to cease all sorts of practice, and, worse than that, is put in a position where he loses all the practice he has had. A salary of $7,500 for our supreme court judges would be little enough; I should say it would be too little. It ought to be at least $10,000, under present circumstances, to afford an opportunity to make a proper selection. I am not saying but what we have good judges now; but in order to be sure to keep good judges if we have them, and if we haven't them, to enable us to get them and keep them, requires a salary at least as large as that recommended by the committee.**

MR. W. A. FUNK: **I cannot for the life of me see why we should adopt the resolution, nor why a distinction should be made as between the salaries of the judges in Ramsey and Hennepin counties and those in the rest of the state.**

The judges in the districts outside of the cities have to leave their homes, pay railroad fare and hotel bills, and hold court in different counties. I cannot see why they should not receive fully as large salaries as the judges in the Twin Cities. I certainly would feel like voting against so wide a margin.

MR. THOMAS KNEELAND: I move as an amendment to the recom-mendations of the report, that the salaries of all judges of district courts throughout the state be fixed uniformly at the sum of $5,000 per annum.

MR. FUNK: I second the amendment.

MR. WHEELWRIGHT: I have been practicing law in Minneapolis for about twenty years. I think I can safely say that for at least ten or twelve years of that practice we had a non-partisan judiciary in this county. It is not possible for me at this time to recall the number of instances where a nonpartisan judiciary has been selected, but I know there have been many such instances. Judge Smith was in some instances, if not always, selected by both parties as a candidate for that office. Judge Koon, Judge Lochren and Judge Young were selected, at least in some instances, on a non-partisan ticket.

Now, what this committee had in mind was simply this: We believed it would be possible, under the convention system, at least on some occasions, to secure a non-partisan judiciary. We believed that under the convention system, if the lawyers would work harmoniously together, a non-partisan judiciary could be selected. We did not believe it possible under the primary election law. We did not believe that the people at large are so well fitted to select men for that high office as would be a convention of persons selected for that purpose.

Now, just a word as to the question of salary. My understanding is that the district judges in the country districts get $3,500 a year. So far as I am personally concerned, and I think probably the other members of the committee feel the same way, I should like to see them receive as much as the judges in these two cities receive. I think they are entitled to it, and probably there is no reason why they should not receive it. If an amendment to that effect is pro-posed, certainly for myself, as a member of this committee, I should have no objection to it.

I do not be1ieve it lies in the mouth of a lawyer to say with good grace that $7,500 a year is any too much money to be paid a judge of the supreme court of this great state. It seems to me that that is a small enough sum for a man to re-ceive who occupies that high position. The term of office is short under some circumstances. A man has to give up his business, and he goes upon that bench at such a time of life that when he leaves it it is hard to build up a practice again. It seems to me, when you take into consideration the dignity and honor of the position and the duties that those judges are called upon to perform, that a salary of $7,500 a year is little enough for them to receive. So far as I am

concerned, I should be glad to see the salary which is paid them fixed at a much higher figure than that.

The fact that the federal judges receive only $6,500 a year, or $7,500 a year, does not seem to me to be conclusive on that proposition. Those men are elected for life. When they have reached a certain age limit, they are retired on an annual salary. Their future is looked after by the government. That is not so with the judges of our state courts.

We all know what the experience has been in this county in the last ten years. Men who have gone onto the bench here and have shown themselves capable of discharging the duties they were called upon to perform, have left the bench because they did not feel that they were earning as much as they could if they were at the bar. I know of one instance in this county where a man who has had a large family to support, a large number of children growing up, has stated that it was all he could do to make both ends meet on the salary he was receiving. And it seems to me that the lawyers at this bar ought to be willing to go before the legislature and try to see if salaries cannot be given to our judges large enough to afford them at least a respectable living. (Applause.)

MR. JAMES ROBERTSON: The recommendation does not meet with my approval; and I doubt very much if it meets with the approval of but very few of this association. I am not in favor of a convention; I am in favor of the primary system. I believe if the people are able to choose other public officers, they are also able to select our judges. The remedy for this matter is in a constitutional convention for this state. That is something we need more than anything else. We should not balk because the difficulties are great. We should express our honest, candid opinion. And I believe there is not a man present, or any attorney practicing at the bar in Minnesota, but who believes in the appointment of a judiciary for life or during good behavior, and retirement on a pension. And that is the logical outcome of this difficulty.

Now, I am in favor of the recommendation for an increase of salary. I believe our judges are inadequately paid. I believe the country judges should have revolted long ago on the proposition of a $3,500 salary, and that our supreme bench should certainly have been remunerated much more largely than they have been.

Now, Mr. President and gentlemen, it seems to me we should look this matter squarely in the face. If we go along in a half-hearted way and recommend things that we do not conscientiously believe in, we will never accomplish anything for the good of the community.

I believe that the report should be accepted and that the committee should be given further time. *

THE PRESIDENT: The question at present before the house is on the motion that the recommendation of the committee be amended by recommending that the salaries of all judges of the district court be placed at $5,000.

MR. FOSNES: I have always taken the position that the country judges should receive just as much compensation as the city judges. But we have had experience in legislative matters. You can't get all you want at once. There is now a difference of $1,500 between the salaries of the city and country judges, the state paying $3,500 and the counties of Hennepin and Ramsey an additional $1,500. My understanding of the thing was to leave the arrangement in the same way, and if these two counties want to pay an additional $1,500 it doesn't make any difference to us.

We are not troubled in the country, so far as I know, with our judiciary. I think it is safe to say that the country districts have as good men now as could be obtained if the salary were increased.

I signed the report with the understanding that the city judges receive $1,500 more now than the country judges, and I was willing to consent to a recommendation that would raise the salary of our country judges $1,500.

MR. AMBROSE TIGHE: In my judgment it would be absolutely impossible to get a bill through the legislature which would provide a different salary for the judges in different judicial districts, the whole of which should be paid by the state. I move as an amendment to the motion, that the salary be placed at $5,000 throughout the state, that the state's contribution to the salary of the judges be $5,000 uniformly throughout the state, and if any district desires to have additional compensation paid to its judges, or if additional compensation be fixed by law in any district, that the additional compensation be paid by the counties composing the judicial district.

The motion was seconded.

MR. KNEELAND: I accept the amendment.

THE PRESIDENT: The motion, then, is that the recommendation be amended so as to read that the Bar Association recommends that a uniform salary of $5,000 be paid to all district judges throughout the state, and that if a larger sum be paid, the excess be paid by the counties constituting the district.

The motion was put and carried.

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* **MLHP: there seems to be a typo here. Robertson obviously opposed the report.**

THE PRESIDENT: The question now is upon the adoption of the report as amended.

MR. CAIRNS: I believe in the primary election law, but I also believe there is a great deal of merit in the recommendation of the committee that judicial nominations be not made under the primary law. I believe that particularly in our county of Hennepin, and probably throughout the state, the matter might receive more thorough attention through the delegate system, or the convention system, than under the primary election law. The chief difficulty is that we are now nominating a great number of people for various offices at the same time, and it is impossible for the masses of the people to give the attention which is due to the important office of judge. I therefore am disposed to vote in favor of the adoption of the committee's recommendation upon that subject.

MR. DAR REESE: I favor the resolution as amended, and specially favor that portion relating to the salary of the supreme court judges. They are perhaps the hardest worked men in the state of Minnesota, and among the poorest paid. I am in favor of raising their salaries to $10,000, but perhaps $7,500 is all right.

MR. A. H. HALL: It seems to me we are making a recommendation upon a subject of very serious import to the state. I cannot but believe that every thoughtful man, observant of the political development of our state, has recognized that the primary election law marks a great advance in the political system of our state. And it ill-comports lawyers, who ought to be leaders in the development of the political system of the people, to admit defeat at the very infancy of this law. It is crude; it needs developing. We should not, at the outset, say that we cannot elect our judges by that system without loss to the prestige or character of the bench.

It has been said that we have had non-partisan judiciaries. There was never but one non-partisan judiciary ticket named in this district; and that was about fifteen years ago. There were only three candidates, and it was a love-feast all around anyhow. On the contrary, when the primary election law went into effect, it resulted in the election of two Republicans and two Democrats. A pretty satisfactory result, I think you will all say.

Gentlemen, we must go slow. The primary system is still in its infancy. It is being copied throughout other states in the Union. It does need pruning and development. But to stand here as lawyers and scout and discredit it, is not consistent with our duties. An amendment was suggested to the last legislature which, in my judgment, fairly meets the situation; and it was this: To so amend the law that no partisan designation should appear upon the ticket opposite the name of any candidate for the office of judge. Let the parties nominate their candidates, but let no partisan designation appear opposite the name of any judge. Then the voter could select his man and have some inducement to select

him for his qualifications and not for his party affiliations.

Therefore I move that the recommendations of the committee be amended to read thus: That we recommend such an amendment of the primary election law that the designation of party opposite the name of each candidate for the office of judge upon the judicial ticket shall be omitted and not appear or be printed upon the ticket.

The motion was seconded.

JUDGE STEELE: I cannot agree with my friend Hall, nor my friend Smith.

The inherent difficulty, so far as selecting judges under the primary law is concerned, lies in the institution itself, and you cannot amend it. You have on the primary ticket a lot of self-projected candidates, over whom you have no control. Any man who pays $10 to have his name put on the ticket can have it there, and there are forced upon us three or four or five self-projected candidates, and none of them may be our choice. The difficulty with the whole system is that there is no room for deliberation; no room for thought. You simply have to take what is handed you; there is the difficulty. And you cannot remedy it so long as the primary system applies to judicial candidates. Under the old convention system there was an opportunity for deliberation.

I heartily favor the recommendation of the committee.

MR. JOHN DAY SMITH: I heartily favor the increase of salaries throughout the state to $5,000. And I believe in a non-partisan judiciary, if we can obtain it. I presume this report will be adopted. I think perhaps I may vote for it. But I cannot help remembering the experience we had when the opportunity existed for nominating a non-partisan judiciary. It has been stated, that the late lamented Judge Smith was nominated — possibly he was once — under that system. But I cannot help recalling a state convention, in which I had the honor to sit, where there was an opportunity to nominate a non-partisan judiciary for the supreme bench; and I remember, also, that the late lamented Judge Mitchell, as fine a lawyer as ever sat upon the supreme bench of this state, was there deliberately turned down by a Republican convention, composed largely of attorneys. Now the question is, whether if we return to the old system it will improve matters or not. I am in doubt.

The previous question was called for.

MR. A. H. HALL: For the purpose of intelligently voting, I move that the question be divided, and that we first pass upon the matter of the increase of salary.

The motion was seconded and carried.

THE PRESIDENT: The motion, then, is upon the recommendation to increase the salaries of the district judges to $5,000 per year, uniformly throughout the state, the salary to be paid by the state.

The motion was put and carried.

THE PRESIDENT: The motion now is upon the recommendation of the report to increase the salaries of the supreme court judges to $7,500 per year.
The motion was put and carried.

THE PRESIDENT: The motion now is upon the recommendation of the report that judicial candidates be nominated by convention instead of by the primary system.

Upon the vote a division was called for, and the motion was declared carried; 46 ayes, 17 noes.

. . . .

[the convention then debated, amended and passed the recommendations of the Committee on Supreme Court Reports. The following motion was then made and passed]

MR. LAFAYETTE FRENCH: I move that this Association request the State Central Committees of the Republican and Democratic parties, in the nomination of candidates in their respective conventions, to proceed, first in order, to the nomination of judges of the supreme court.

The motion was seconded and carried.
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