

RECALL OF JUDGES.

The "Committee to Oppose the Judicial Recall" at the 1918 meeting of the American Bar Association, rendered a report which stated that:

"So far as concerns either the enactment or enforcement of legislative measures providing in terms and directly for judicial recall, either in the form of recall of judges or of judicial decisions, judicial recall many now be viewed as generally understood and therefore discredited through the country, and to the extent that the menace of judicial recall so far as direct legislation is concerned, is a thing of the past."

The recall of judges *for cause* has for years received extended attention at the hands of lawyers, editors, legislators and publicists, and has generally been condemned. The recall of judges *for no cause* at all has received no attention. Yet *recall without cause* flourishes throughout the country. It is not designated by the name "recall." The operation of a much cherished method in the selection of judges directly results in a very great number of cases in the recall of judges without cause.

In most of the states of the Union, judges are nominated at party primaries or conventions. In nearly all our states, judges are elected at regular state or national elections as candidates on party tickets. The Judicial candidate, with rare exceptions stands or falls with his party.

A few examples will clearly demonstrate the perniciousness of the system. In 1912, Judge X....., who had served his term as judge in a Western State, to the complete satisfaction of the bar and the public, suffered defeat, together with the rest of his party ticket. He was thus removed from the bench, not because of anything that he had done, but *because the*

voters in his jurisdiction did not like what President Taft had done.

Had Judge X..... been up before the electorate alone at an election called to decide the single issue, "Shall Judge X..... be retained in office or shall he be recalled?", he would, undoubtedly have been retained by a practically unanimous vote.

Judge Y..... in 1916, after demonstrating rare ability, industry and fitness for judicial office, was defeated for re-election in one of our central cities, not because of anything he had done, but because the voters in his jurisdiction did not like what Mr. Wilson had done. Thus a Judge whose record had won universal commendation was removed from the bench because of no fault of his, but because of alleged faults found with the head of the national party ticket which he happened to be on. He was recalled, not for cause, but in despite of the most urgent reasons for retaining him on the bench. Had there been framed and submitted at a special election, the single issue: "Shall Judge Y..... be recalled or retained?", unquestionably the vote would have been overwhelmingly in favor of retaining him.

Judge Z..... in 1920 was defeated for re-election. He was indorsed by the Bar Association, his record had won unanimous approval. But the voters of his district did not approve of President Wilson's position in the League of Nations and so the whole ticket was defeated. And yet if the single question had been submitted to the voters at a separate election: "Shall Judge Z..... continue in office, or be recalled from office," the vote would have been overwhelmingly in favor of continuing him in office.

Our ballot is now long, and the road seems even longer to the short ballot. Our judges are elected on partisan tickets, and this inevitably means that the faithful, fearless judge at the end of his term must run the gauntlet of party boss in convention or primary to obtain the nomination, and if he escapes forcible recall in that quarter, he must suffer his

name to be submitted at an election, where partisan political considerations control to the complete obliteration of the one consideration vitally affecting his career, and the public interest in his candidacy for the office of judge, viz. his qualifications and his record on the bench.

The hazard which he runs is the hazard of the *recall without cause*, or rather for causes not even remotely connected with his fitness to discharge the duties of the office of judge.

Do we not have in the stereotyped form of partisan judicial electors, a most vicious variety of the recall of judges?

There is scarcely a lawyer at the bar who would not welcome an appointive judiciary if he felt that Governors, in appointing judges, would exercise as sound a discretion in other states as they have exercised in Massachusetts and New Jersey. Perhaps they would, if the responsibility were placed squarely on their shoulders.

“But,” the objection is raised, “the people would never consent to surrendering control of the judiciary.” And that probably is true. Yet is it not possible to substitute a fair and just control in place of the purely arbitrary, capricious, blind and disastrous control, now exercised through partisan elections, where judges are recalled in the midst of careers giving universal satisfaction—recalled not for something they have done, but for something the presidential nominee or some other partisan candidate on their ticket has done? This present supposed “control” by the people in actual practice rarely ever results in any control at all by the people, but usually, if at all, by the politicians.

Suppose State Constitutions were so amended that Governors appointed judges for a term of twenty years (or even fifteen years) with the power reserved by the people, after two years of the term had elapsed, to recall *for cause*? A recall election conducted for cause stated, held separate and apart from any other election, would present a clear-cut issue, and with ample opportunity for consideration of the issue, it would undoubtedly result in the vindication of any fair judge. In all

probability such elections would prove to be as rare as impeachment proceedings under existing methods. Perhaps the people would really prefer a control of this character to the present method of electing for short terms, and then compelling the judge who is willing to continue on the bench, to run the gauntlet of political bosses and partisan issues in perilous campaigns for renomination and re-election. Unquestionably Governors thus directly confronted with the responsibility, would appoint high-grade men to the bench. The Judges in two years would be able to demonstrate their ability. Then if the recall were invoked against Judge X..... or Judge Y..... or Judge Z....., it would for *cause stated*, and the bar and the public would be able to meet the issue squarely and overwhelm any attempt to recall a just and fearless judge.

A fair and courageous Judge need not then hesitate to do his full duty through any apprehension as to politician or boss lying in wait for him at the next convention or primary. A faithful Judge would be able to proceed with his work, unharassed by concern as to the effect upon his future of fearless decisions. He would know that his continuance in office could not be made to depend upon undisclosed personal prejudice, partisan passion or whim, or secret political control or favor. He would not be the subject of popular election except upon a single issue based upon his own record, and the issue so framed would of necessity be fought out and decided upon the basis of the cause stated, and upon that basis alone. The President or Congress might then do as they saw fit, without imperiling throughout the different states in the Union, the stability of the bench or placing in jeopardy the judicial career of able men at the point of their greatest usefulness.

Might it not be well, then to consider the propriety of the abolition of the form of judicial recall, (not so denominated but so working out in actual practice, now in force in nearly

all the states, the compulsory judicial recall, the judicial recall without cause, without rhyme or reason, and consider the substitution for it of a method of stabilizing our judiciary through the system of an appointive judiciary, providing long terms, reserving to the people the right to exercise, after two years, the power of recall *for cause stated* and *only for cause stated?*

X. Y. Z.