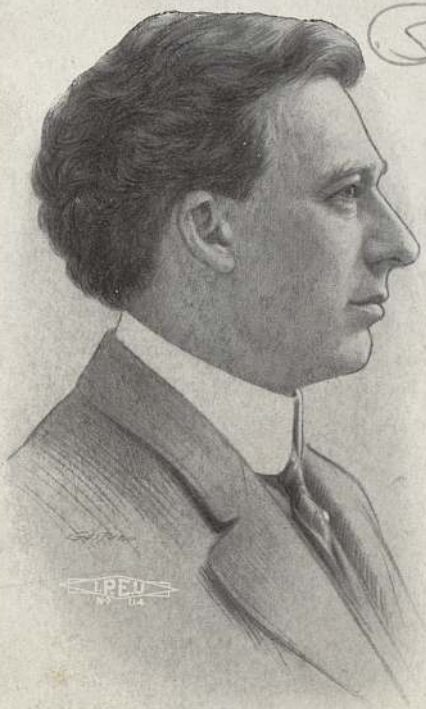
FOR JUDGE

SUPREME COURT OF APPEALS OF W. VA.



EDWARD GRANDISON SMITH

Of Harrison County, Democratic Nominee

WITH THE COMPLIMENTS OF

Please read and pass to another voter regardless of political affiliation

Our Judiciary, Its Functions, Its Faults and a Remedy.

—By—

EDWARD GRANDISON SMITH, LL. D.

Democratic Nominee for Judge of the Supreme Court of Appeals of West Virginia.

An Address Delivered September 16, 1912, Before The Wilson Working Club of Clarksburg, and Revised.

OUR JUDICIARY

Mr. President and Gentlemen of the Wilson Working Club of Clarksburg:

Being a candidate for Judge of the Supreme Court of Appeals, I have been told that I should not speak on our judiciary, not until after election; that the people have no right to hear their judicial candidates until they hear them from the bench. That might be too late. Nevertheless, in pre-convention days, I strictly heeded these admonitions. But now conditions have changed, changed from what they were before the convention, and changed from what they have ever been in this country. Now every national political platform, and every state platform of a party nominating judicial candidates, for the first time in the history of the country, contains a plank on the judiciary. Who should understand the judicial issues involved, who should discuss them if not the judicial nominees? And whom else, before they vote for or against these nominees, do the people, the voters, want to hear discuss them? Whom else have they more right to hear upon this important subject? Moreover, I take it the judgment of this more than representative club, of this more than representative city of West Virginia, in extending this invitation, not only reflects the general view, but is, itself, entitled to that consideration which justifies acceptance.

Should a judicial candidate speak?

The importance of the judicial office

You are interested in the election of your legislative officers, delegates, senators, congressmen, as you should be. They will enact public laws. They will carry the public purse.

You are interested in the election of your executive officers, as governor and president, as you should be. They will execute your laws. They will symbolize government. They will carry the public sword.

But are you interested in the election of your judges, as you should be? They will administer justice, the greatest interest of man on earth, the end of free government.

As incidental to the administration of justice, the courts construe constitutions and statutes and state the law. In doing so, they decide finally whether the Congress or the state legislature has enacted a valid law, and if valid, what it means. In the United States during some periods they have declared void an average of more than seventy statutes annually. Nearly every voter will remember instances. Some will remember that the Congress, composed of some four hundred senators and members, passed an income tax law, and that the Supreme Court of the United States, composed of nine justices, by a mere majority, declared it void. Those venerable West Virginians, who rendered military service in the Civil war—whether in the armies of the Confederacy, or in the armies of the Union—will remember that our state

legislature, composed of nearly one hundred senators and delegates, passed an act affecting the rights of belligerents, and that our Supreme Court of Appeals, then composed of four judges, declared it void. A younger generation, now in the pride of mature manhood, will remember that Congress passed an anti-trust act, and that the Supreme Court found a stinger in it, or put one into it, according to the view, and quite recently, in another case, pulled that same stinger out again. And our young men who are now about to cast their first presidential ballot may remember our Supreme Court of Appeals has said to the Governor, Your veto is a nullity. And it was so. But aside from the jurisdiction illustrated by these instances, I repeat after Chief Justice Marshall:

"The judicial department comes home in its effects to every man's fireside. It passes on his property, his reputation, his life, his all. I have always thought from my earliest youth till now that the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary."

Length of judicial terms

Interest in the selection of officers naturally bears relation, not only to their powers and duties, but also to the length of their respective terms. Our state senators, governor and president are elected for four years, our delegates and members of Congress for two years, our United

States Senators for six years, but the judges of our Supreme Court of Appeals are elected for twelve years, and our Federal Judges hold practically for life.

It follows that, of all officials, the selection of none deserves your interest and discriminating attention more than the judges. And their selection should be made with reference, not only to the importance of the judicial function and to the length of the judicial term, but also with reference to judicial faults causing public dissatisfaction which you may wish to avoid.

Judicial faults to be avoided

We regret to acknowledge the judicial function has not always been exercised to the satisfaction of the people. Our courts have generally been composed of judges coming from the same political party, first the Federalist, then the Democratic, and now for many years the Republican, and consequently have been and are wanting in party balance and in these qualities which naturally flow from balanced courts.

Within the last few months we have seen two federal judges charged with misconduct in office, and we have seen one of them resign, and the other arraigned before the Senate by the House of Representatives at Washington. A little earlier we saw two federal judges, less conspicuously charged with misconduct and each resigned. During this campaign we have seen a state judge charged with misconduct,

Misconduct

and we have seen his resignation without impeachment and without trial. Isolated cases, but reflecting, nevertheless, upon the general administration of the law.

But the people assert the more common and general sources of their dissatisfaction are the high cost, the delay and the uncertainty of litigation and unrighteousness of decision, matters which, within limits, the judges themselves control as much as they control their individual integrity.

High Costs

I know, and you know, and the country has come to know, the courts are responsible for much of the high costs of litigation by their moss-covered rules of court; by their favoring officials, and by their failing to expedite, as they might, the public business. Has not the time come to "recall" the high costs of litigation?

Delays

I know, and you know, and the country has come to know, the courts are responsible for much of the delays in litigation. An instance illustrates a class of delay. By a rule of our Supreme Court of Appeals, going the full length if the statute, a party obtaining an appeal need not print the record for six months. Six months of sleep! This rule of court and statute, and others of their kind, if ever satisfactory, are now archaic. They were made for another age. A second class of delay results from inefficient activities. An instance or two of this: Our Supreme Court of Appeals hears for two hours and a half carefully prepared oral argu-

ments, pro and con, punctuated here and there by interrogations from the court, the best means yet devised to aid the court in arriving at the truth. A year later, more or less, when these illuminating arguments and counter arguments are forgotten, the case is decided. This labor of counsel, covering, it may be, weeks of preparation, and this time of the court, the judges themselves admit are lost. A third class. While their dockets are behind, why should any judges loaf near a third of the year, save to keep them so? Another class of delay is illustrated by a case wherein our court took one hundred twenty-four pages to state concisely in writing the reasons for its decision. On an average, one-half of the verbiage of its opinions might be eliminated and still they would not come up to English brevity in Eldon's time. And we recall no instance in which he was charged with inconsiderate haste. But illustrating another class of delay, many will recall the anecdote of the application to him for an injunction to restrain the sale of a cargo of ice, that while Eldon was doubting the ice melted. How pertinent in our busy age, where time is so important, but where cases hang on our dockets from one year's end to another, both before and after submission! How often, while litigants wait, not on the court's " considerate haste," nor on its deliberate judgment, but on its indifferent, doubting, blundering or premeditated delay, as the case may be, situations change, objects fail, gas-wells exhaust, oil-wells run dry, for-

tunes flee, bankruptcy comes and the end of the case looks only upon ruin. Are you not ready to "recall" this sort of judicial in-"decision"?

Uncertainty and Unrighteousness

I know, and you know, and the country has come to know, the judges sometimes juggle with legal principles and statutes, originally thought to be straight and certain, until they come now to wiggle like a worm fence and now to shift like the sands of the sea, making litigation always more uncertain than need be, and often making the judgment downright unrighteous. Our highest state court has confessed in these words:

"No one, without divine foreknowledge, can foretell what the future conclusions of the court may be, under change of time, quantity, quality and circumstances.

This is not as it should be, and if you are alive to your powers and your duties as voters, this is not as it shall be. It requires no constitutional amendment and no new statute and no delay to enable you to "recall," at this election and at every election, those judges standing for your suffrage whose judicial careers have made for uncertainty or unrighteousness of judicial decision. Some may think I have said too much, but I could not have said less. I believe in reducing the costs and the delays of litigation and the uncertainty and unrighteousness of judicial decision and I know the courts can reduce them. To make justice expensive, to

delay justice, to make justice uncertain or unrighteous, is to deny justice. Ancient Magna Charta guarantees us, not only against sale of justice, but also against delay and denial of justice, all in the same category and in the same sentence. Note its simple words:

Magna Charta

"To no man will we sell, or deny, or delay right or justice."

Has Magna Charta been violated? Can it really be true that "right or justice" has been so generally delayed or denied in this free country as to attract general public attention? Let every political party in the nation stand up and answer:

The old Republican party stands up and by its national platform answers in these words:

"That the courts, both federal and state, may bear the heavy burden laid upon them to the complete satisfaction of public opinion, we favor legislation to prevent long delays and the tedious and costly appeals which have so often amounted to a denial of justice in civil cases and to a failure to protect the public at large in criminal cases.

Republican National Platform

"Since the responsibility of the judiciary is so great, the standards of judicial action must be always and everywhere above suspicion and reproach. While we regard the recall of judges as unnecessary and unwise, we favor such action as may be necessary to simplify the process by which any

judge who is found to be derelict in his duty may be removed from office."

And by its state platform in West Virginia it further answers:

Republican State Platform

"We favor the simplification of the procedure of our intermediate and circuit court, the lessening of the costs of litigation and the abatement of the cumbrous machinery of the law; and in rendering decisions the court should depend upon the equities involved, rather than upon legal technicalities, for we desire simpler cheaper and more perfect justice to all —rich and poor alike."

The Progressive party stands up and by its national platform answers in these words:

Progressive Platform

"The Progressive party demands such restriction of the power of the courts as shall leave to the people of the ultimate authority to determine fundamental questions of social welfare and public policy * * *

"The Progressive party, in order to secure to the people a better administration of justice and by that means to bring about a more general respect for the law and the courts, pledges itself to work unceasingly for the reform of legal procedure and judicial methods."

The Prohibition party stands up and by its national platform answers:

Prohibition Platform

"We favor: * * * The Initiative, Referendum and Recall."

Without excepting the judiciary, an expression of distrust.

The Socialist party stands up and by its national platform answers:

Socialist Platform

"* * * We advocate and pledge ourselves and our elected officers to the following program: * * *

"8. The abolition of the power usurped by the Supreme Court of the United States to pass upon the constitutionality of the legislation enacted by Congress. National laws to be repealed only by act of Congress or by a referendum vote of the whole people."

"15. Abolition of all federal and district courts and the United States Circuit Court of Appeals. * * * The election of all judges for short terms."

"16. The immediate curbing of the power of courts to issue injunctions."

"17. The free administration of the law."

The Democratic party stands up and by its national platform answers in these words:

Democratic National Platform

"We recognize the urgent need of reform in the administration of civil and criminal law in the United States, and we recommend the enactment of such legislation and the promotion of such measures as will rid the present legal system of the delays, expenses and uncertainties incident to the system as now administered."

And by its state platform in West Virginia it further answers:

"* * * Judges should not be autocrats,

and it is well known that some of them forget their high station and become biased, neglectful and careless, and others lose the confidence of the people by practices not always sufficient to justify impeachment proceedings even where these practices can be proved. * * * Some practical, just system for holding judges to the same responsibility for misfeasance or malfeasance in office, as are other officials, should be adopted.

Democratic State Platform

"The reforms are represented in sincerity to the end that this state shall not lag behind in the forward movement of mankind to bring their government up to the modern civilization and to make every one responsible to the law; to increase respect for constituted authority and to restore faith in the justice of our civil institutions."

After these solemn platform declarations of every political party in these United States, without stopping to compare their relative merits, but considering what is common to them all, respect as we may our judges, honor as we do our courts, revere as we must our laws, we are forced to acknowledge grave imperfections in the adminstration of justice, and to urge that the time has come when the selection of judges must have more of the attention and the interest of the voter, to the end that the more grave and common faults may be hereafter avoided.

The courts having the power within themselves to obviate these faults, why

do the people of every political party in the nation think and say the courts have not done it to their satisfaction? Where is the general trouble? And what general remedy is available to the voters at this election?

The most casual view of the judicial department of our governments, state and national, discloses want of party balance already adverted to. It has long been officered almost exclusively by one-party judges, and the minority of our people have not had due representation in the judicial department. It has long been and is politically lopsided, and therefore, unbalanced, and to an extent unrighteous.

A cause suggesting a remedy.

At the polls you select officers to conduct an election from both parties. If this is not done, do you expect a proper conduct of the election? Does a man, rising from an election officer to be a judicial officer, change his skin or his spots?

A desire to have all the members of the courts of one political party can only have its foundation in want of reflection or in a shortsighted selfishness, or in a desire to accomplish some party purpose that could not endure the light.

So it is that party balance stands for righteousness and justness. Courts must be just. After that they must seem to be just, and party balance, other things being equal, means public confidence. Want

Meaning of party balance

of party balance is more serious than merely one party representation on the bench. It sometimes means the selection of men who would never have been thought of as bi-party judges. Party balance means more than mere representation of different political parties on the bench. It means elevation to the bench of men who are expected to measure up at least to the opposition and to merit the general approbation, not merely of one party, but of all parties, by doing absolutely the right under the law as they see it, which, after all, is the vital thing in the administration of justice.

A two party court selected under favorable conditions is the nearest approach to the ideal non-partisan court now practically attainable, and has at least one considerable advantage over it next to be noted.

Party balance means all this and more. One party and no party judges are prone to be content with the existing order of things. They do not march.

Ours is a government under law by men, men being an important term in the equation. If we would have our courts abreast of the times—their judges must be imbued with the learning and inspired by the spirit of the times—some by the one, some by the other of the great schools of thought involved—then we may hope to have on the bench that wholesome generating contact, competition and rivalry of counter ideas to advance the administration of justice and to evolve a glorious jurisprudence, which in other

fields have been so potent to evolve our boasted civilization.

This is not all. I can recall no time when the country thought it wise to elect all the members of the Congress from one political party. And the Congressional office is political. I can recall no time when the people of this state ever thought it wise to elect all the members of the state legislature from one political party. And the state legislative office is political. When these bodies have been most nearly to being all of one political party, they have been most intemperate in their official conduct. Who would not wish to protect the state from an intemperate judiciary?

Examples, State and National

Governor Glasscock is a Republican, an independent, and a partisan. When it was thought the amendment, increasing the members of our Supreme Court from five to seven had probably passed, he publicly announced his intention to appoint a Democrat to one of these two places. Are the rank and file of the Progressives more partisan than Governor Glasscock? President Taft was a federal judge. He understands the practical workings of the judicial department of the government better, perhaps, than he understands the executive department. He is a Republican, a conservative, and a strict party man. When he filled vacancies on the Supreme Court of the United States, the most august tribunal on earth, two of his four new appointees

were Republicans, and two were Democrats. Are the conservative Republicans more partisan than President Taft? I am advised the long overwhelmingly Republican state of Pennsylvania has provided by law that when two judges are to be selected they shall not come from the same political party. You may accomplish by your votes at this election, and others, what is there required by law.

Necessity for prompt relief

Whether you emulate the example of your Progressive governor or whether you emulate the example of your conservative President, whether you regard the precedent of the great state of Pennsylvania or whether you regard the interest of all the people and your own sense of right, will you not vote at this coming election and at all elections to give party balance to your courts, both State and National, not as a panacea for all our judicial ills, but as a very natural and potent remedy at once available? You must know whatever is to be done needs to done with reasonable promptness and dispatch. These so common judicial violations of the Great Charter already pointed out, if continued, may soon come to be generally accepted as neither necessary nor innocent imperfections in the administration of justice, but as convincing evidence in the judiciary system, — that system which very many good men already fear has long been forging chains for our liberties in every department of

our government; of that system which, in the legislative department has already drawn forth the Chatham-like eloquence of our native Dolliver; of that system which, battling for the executive department, armed the imperial Roosevelt with a cause translating Chicago into Armageddon and cleaving a party omnipotent for nearly half a century; that system which is equally potential in state and nation. And we know full well that, whatever may transpire elsewhere, just so long as the judiciary enjoys the confidence of the people and administers real justice, our liberties are secure, and no longer.