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ADDRESS

BY

SENATOR ROBERT L. OWEN

BEFORE THE BAR ASSOCIATION OF MUSKOGEE, OKLA., AND PUBLISHED IN THE DAILY OKLAHOMAN OF SUNDAY, DECEMBER 31, 1911, RELATIVE TO THE

RECALL OF JUDGES.

PRESENTED BY MR. CHAMBERLAIN, JANUARY 11, 1912.

Mr. OWEN said:

Gentlemen of the bar, as a member of this association I take great interest in this body and its deliberations. I made the first draft and secured the passage of the bill establishing the United States court for Indian Territory in 1889, and was the secretary of the first bar association, which was organized at that time at Muskogee, Ind. T. As a representative of Oklahoma in the United States Senate, I introduced a bill (S. 3112) on July 31, 1911, providing for the election and recall of Federal judges and discussed the matter on the floor of the Senate, giving the reasons which, in my opinion, justified this reform.

The issue which was raised in this way has resulted in widespread discussion on the question of recall, particularly in bar associations throughout the Union, and naturally the bar, feeling a sense of loyalty and affectionate regard for the bench, seems inclined to question the wisdom of the judicial recall. But it also is true that many judges of the highest distinction regard the judicial recall as essential to the safety of the people and to the honor of the bench.

RECALL NOW OPERATIVE.

Since the members of the bar are taught to reverence precedents and to believe that precedents, being founded on wisdom and experience, should not be ignored nor disregarded; I call your attention to the fact that the matured judgment of the American people has found it wise to establish control over the State judiciary in at least six different ways: First, by impeachment; second, by legislative recall; third, by executive recall; fourth, by automatic recall by fixed tenure; fifth, by popular recall; and sixth, by requiring judges to submit themselves to popular vote for nomination and election.

Three States have four ways of recalling judges, to wit: Popular recall, legislative recall, automatic recall by short tenure, and recall by impeachment.

Thirty-five States have three ways of recalling judges, to wit: Impeachment, automatic recall, and legislative recall.

Forty-eight States have two ways of recall, to wit: Impeachment and either automatic recall or legislative recall.

Every single State has at least two methods of recall, either legislative or automatic and recall by impeachment. I submit a table of the various States, indicating the recall by impeachment by one star (*), impeachment and automatic recall or legislative recall by two stars (**), impeachment, automatic recall, and legislative recall by three stars (***), and States with four forms of recall—impeachment, automatic, legislative, and popular recall—by four stars (****), Arizona being included in the latter for good reasons, well understood.

Recall of judges.

States.	How elected.	Forms of recall.	Term.
			Years.
Alabama	Elected by voters	***	5
Arkansas	do	**	8
Arizona	do	****	6
California	do	****	12
Colorado	do	**	9
Connecticut	Elected by general assembly	***	8
Delaware	Appointed by governor	***	12
Florida	Elected by voters	***	6
Georgia	Elected by general assembly	***	6
Idaho	Elected by voters	**	6
Illinois	do	***	9
Indiana	do	***	6
Iowa	do	**	6
Kansas	do	***	6
Kentucky	do	***	8
Louisiana	do	***	12
Maine	Appointed by governor	***	7
Maryland	Elected by voters	***	15
Massachusetts	Appointed by governor	**	(1)
Michigan	Elected by voters	***	8
Minnesota	do	**	6
Mississippi	Appointed by governor	***	9
Missouri	Elected by voters	***	10
Montana	do	**	6
Nebraska	do	**	6
Nevada	do	***	6
New Hampshire	Appointed by governor	**	(1)
New Jersey	do	**	7
New Mexico	Elected by voters	***	.....
New York	do	***	14
North Carolina	do	***	8
North Dakota	do	**	6
Ohio	do	***	5
Oklahoma	do	**	6
Oregon	do	****	6
Pennsylvania	do	***	21
Rhode Island	Elected by general assembly subject to resolution general assembly.	**	.....
South Carolina	Elected by general assembly	***	8
South Dakota	Elected by voters	**	6
Tennessee	do	***	8
Texas	do	***	6
Utah	do	***	6
Vermont	Elected by general assembly	**	2
Virginia	do	***	12
Washington	Elected by voters	***	6
West Virginia	do	***	12
Wisconsin	do	***	10
Wyoming	do	**	8

[1] During good behavior.

New Hampshire has been recalled four times.

The Cherokee Nation in Oklahoma provided for impeachment, executive and legislative recall, and elected judges by popular vote.

For details see Thorpe's Constitutions and remarks on this question by me Monday, July 31, 1911, in United States Senate.

It will thus be seen that all of the States have at least two methods of controlling judges besides requiring the judges to be elected in nearly all the States. Most of the States have three methods of recall besides requiring the judges to be elected.

RECALL A SAFEGUARD.

The reason underlying this universal constitutional control of the judiciary is to safeguard the life, liberty, and property of the people against the frailties of human nature, demonstrated by history and experience in an uncontrolled judiciary.

Great Britain in the act of settlement of 1701 provided for the recall of British judges by act of Parliament, and has exercised this right

ever since, with the most satisfactory results, for 210 years. The moving cause in Great Britain for establishing the legislative recall was the brutal tyranny and unspeakable depravity of a lawyer named George Jeffreys, who had been appointed lord chief justice of England by James II. Jeffreys, for his unspeakable crimes, was sent to the Tower of London, where he died; James II was run out of England, and the bench of Great Britain has not been dishonored since by such conduct as that of Jeffreys. I appreciate the suggestion of our friend Hon. C. B. Stuart, in his ingenious address, that "the lawyer who will not defend judges when they are unjustly assailed, and who will not shiver a lance for the upright and brave judiciary, is not worthy to sit in the sacred halls of justice." With this excellent suggestion no man should take issue, especially when an upright and brave judiciary is not assailed. I do not recall at this time any recent assault on judges that has required any defense or of any defense that has been made of judges unjustly assailed. There seems, however, to have been an impression with some of my friends of the bar that my proposal of legislative recall of the Federal judiciary contemplated the popular recall of the Oklahoma State judiciary. I was not aware, however, that there was any "clamor" in Oklahoma for the popular recall of the State judiciary. I heard of this clamor for the first and only time at this meeting.

Certainly, I have not advocated or even considered the question of popular recall of judges in Oklahoma. Oklahoma has now the right of recall by impeachment. Oklahoma also has the automatic recall of judges by short tenure of office, which serves automatically to remove any judge who may be inefficient or whose integrity might be doubted by the people. Oklahoma has now a safeguard of having on the bench judges nominated at the primaries by the people as acceptable to the people and subsequently elected by the people as satisfactory to them. The judges had the confidence of the people before they were nominated, they had the confidence of the people before they were elected, and I trust they will always deserve the confidence, the honor, and the distinction they now enjoy. I wish to say, moreover, that I have felt a special and peculiar pride in the Supreme Court of Oklahoma, which already has won a very high place in the judiciary of the States of the Union for the learning and the legal discrimination and for the splendid decisions of that court.

REASONS FOR RECALL.

The reasons justifying the legislative recall of the Federal judiciary:

The legislative recall by resolution of Congress of the Federal judiciary is necessary and is based on the same identical reasoning upon which 35 of the States have adopted this procedure for State judiciaries. That is, that impeachment is too severe a remedy in certain cases and is impracticable for offenses requiring removal but not deserving impeachment. Impeachment should only be invoked for actual personal corruption or serious criminal conduct; but the legislative recall may be necessary and properly invoked even in cases where there is no personal delinquency whatever. It may be invoked for senility, for insanity, for imbecility, for paresis; or, again, it may be invoked upon willful neglect of duty, for inefficiency, for gross incompetency, for intemperance, or for any persistent, tyrannical, malicious, or detestable conduct. Any or all of these things may

arise in the life of an individual, due to physical, mental, or moral decadence.

Judges are only human beings after all, and a careful student of statecraft, guided by the desire to serve the general welfare of the people and of all the people naturally takes a different point of view from the lawyer who has been on the bench or expects to be on the bench and who can not bear the thought of recalling a judge for any of these causes. Yet, thoughtful men must concede that even a judge on the bench may go through physical, mental, or moral decay. He may become, in fact, a neurotic, a paranoiac, an epileptic. He may become an imbecile, or be afflicted with softening of the brain, or with general paresis. May Heaven defend our beloved judiciary from any of these human afflictions; yet, if they should come, in whole or in part, to any of our honored Federal judges, I intend to do what I can as a public servant to defend the interests of the people against such an unfit judge. I am not willing to impeach an honored Federal judge who may be the victim of these unavoidable human afflictions, but as a legislator it seems to be my duty to advocate a remedy which is benign and easily invoked to protect Oklahoma and the United States against Federal judicial incompetency. These reasons are entirely sufficient to justify legislative recall, but there are other reasons why the Federal judiciary should be subject to such recall which are much more important.

DELEGATED POWER.

The Federal judges are not elected by the people. They are not nominated by the people because of the confidence of the people in them, as are State judges. They are not elected by the people because of the confidence of the people in them, as are our State judges. They are nominated by a President of the United States, who himself is not nominated by the people, but is nominated by delegates of the third and fourth degree of delegated power in national convention, who come with delegated power from State conventions; the State conventions being composed of delegates delegated from county conventions; the county conventions being composed of delegates delegated from ward, township, or precinct caucuses or the most part not safeguarded by law. The ward caucus as a rule in the United States is controlled by a ward boss, who seizes the powers of the unorganized, unprotected people of the ward and delegates it to a ward henchman. The precinct delegates sent to the county convention send machine delegates of the second degree to the State convention, which often send machine delegates of the third or fourth degree to the national convention, where these delegated delegates of delegated delegates, resting on this uncertain foundation, nominate as President a citizen who is four degrees removed from the people, and when this President nominates a Federal judge for life this Federal judge is five degrees removed from the people and subject to no review or control by the people. The consequence is we have established a Federal judicial oligarchy in this Nation, as Thomas Jefferson forecast and prophesied in his letter to Jarvis in 1820. No wonder the Federal judges, thus uncontrolled, undertook by judicial decision to magnify their offices. No wonder Thomas Jefferson called John Marshall "a thief of jurisdiction." John Marshall in Marbury *v.* Madison insisted that to allow Congress to determine the con-

stitutionality of its own acts "would be giving to the legislature a practical and real omnipotence." John Marshall, therefore, assumed the "real omnipotence" himself by stealing the jurisdiction to declare acts of Congress unconstitutional, a jurisdiction which was four times refused to be granted to the Supreme Court by the Constitutional Convention of 1787, to wit, on June 5, June 6, July 21, and August 15, 1787.

Thomas Jefferson was right in denouncing this conduct. President Jackson was right in refusing to allow this court to determine the national policy for his administration in the United States bank case, and the American people supported him because he was right and because the American people knew more than the lawyers who happened by ingenious solicitation to have been appointed on this bench.

In recent years the most important national policies of the Nation have been nullified or obstructed by the decisions of the Federal courts, numerous State laws attempting to regulate corporations have been nullified.

INCOME-TAX LAW.

The income-tax law, demanded by 90,000,000 people, was nullified, crippling the power of taxation of the National Government and discriminating against the greater part of the people in favor of those best able to pay and justly owing this tax for the protection they receive.

This decision has cost the producing masses nearly $1,600,000,000 in the last 16 years, made the rich richer and the poor poorer.

The antitrust act has been emasculated in the Standard Oil case and in the Tobacco Trust case. Standard Oil stock went up immediately after this decision, which was trumpeted in the press as a decision against Standard Oil.

The interstate commerce act has been greatly weakened, as I abundantly set forth (Rec., 3701), July 31, 1911.

The compulsory arbitration act, passed as the result of the great strike in Chicago in 1894, and intended to prevent the recurrence of such unfortunate difficulties, was destroyed by the Supreme Court. (Adair *v.* United States, 204 U. S. Rep., 164.)

The employers' liability act was held unconstitutional.

Over 200 Federal and State statutes have been held invalid by the United States Supreme Court alone, and there are innumerable cases where the lower Federal courts have nullified State statutes under the shield of the Supreme Court decision. For example, the Oklahoma constitution, establishing a corporation commission, was declared invalid (Hook); the statute of Kansas taxing the Western Union Telegraph Co. (216 U. S., 1); the statute of Texas taxing the gross receipts of railroad companies (210 U. S., 217); the Minnesota statute regulating the rates of public service corporations (Shepherd *v.* N. P. R. Co.), etc.

The fourteenth amendment, intended to protect the negro, has been twisted from its purpose to protect the trusts and monopolies in imposing long hours of labor on employees on the absurd theory that to deny the employee the right to work long hours is a denial of his constitutional "privileges." The obvious point of view of the court is that a laboring man has such a constitutional right to work himself to death; that public policy may not question it.

FAVORS THE INTERESTS.

A whole series of cases could be pointed out showing that the point of view of the Federal court is favorable to property interests and unfavorable to manhood interests. After all, everything depends on the point of view. If the Supreme Court should consist of nine resolute Irishmen they would decide in favor of home rule for Ireland and give the most learned reasons justifying this opinion. If the court consisted of nine Tories they would give equally as learned reasons against home rule and demonstrate it was a violation of the fundamental law of Great Britain.

If the Federal judiciary is appointed for life and has the final word on State laws, on Federal laws, on national policies, and can not be recalled nor reviewed, then the art of government is reduced to this: The art of nominating these judges. It is an open secret as to who has developed this art in the highest perfection.

The plain truth is that the great powers in the organized financial and commercial world skillfully contrive to nominate these Federal judges and to nominate the President (who nominates the judges) by the use of funds on a gigantic scale, secretly employed; by coercion of employees, and by the far more sinister and dangerous method of coercing the world of finance and commerce by the constriction of credits which may at any time be carried to the point of a national financial panic.

The Federal judiciary has, in my opinion, become the bulwark of privilege and ought to be made immediately subject to legislative recall by the representatives of the people for the safety of the people and for the stability of the property of the masses—of the producers of the Nation.

JUDICIAL INFALLIBILITY.

The organs of privilege continually extol the judicial infallibility of the Supreme Court and teach the people not to question it. The truth is, however, that every time four out of five Supreme Court judges are in the minority, their judicial fallibility is judicially ascertained by the United States Supreme Court. Each of the justices in turn has his judicial fallibility judicially ascertained in case after case until they are innumerable. And the singular condition exists that the change in opinion over night of the vote of one judge, as in the case of Justice Shiras in the income-tax case, may transfer the ascertainment of the judicial fallibility of the four justices who first disagreed with Judge Shiras to the four justices who first agreed with Judge Shiras. In this way his vacillating vote demonstrated by the vote of the Supreme Court justices the judicial fallibility of those who disagreed with him in the first vote and of the remaining four justices who disagreed with him in the second vote.

Thus the changing vacillating vote of one justice put all eight of his associates in the minority in the two votes and thus proved by a majority vote of the Supreme Court the fallibility of every member except Shiras, whose first and second opinions were both confirmed by a majority of the court. The claim of judicial infallibility is ridiculous.

Public opinion demands control of the Federal judges The Democratic platform, 1908, protests against government by the injunctions of the Federal judges.

The Republican platform, 1908, declares against certain injunctions by the Federal courts.

The Independent Party, 1908, condemns the arbitrary use of injunctions and contempt proceedings as a violation of the fundamental American right of trial by jury.

The People's Party of 1908 emphatically condemns the unjust assumption of authority by inferior Federal court in nullifying State law, etc.

The Socialist Party in its platform of 1908 declared "Our courts are in the hands of the ruling classes."

But what difference does it make if the Republicans, the Democrats, and all other parties protest if these judges are appointed for life and can not be recalled?

The most learned lawyers and judges in the country have pointed out this dangerous and mischievous condition, such as Walter L. Clark, chief justice of North Carolina (Arena, November, 1907.)

Judge Clark said:

> At the present time the supreme power is not in the hands of the people, but in the power of the judges, who can set aside at will any expression of the people's will, made through an act of Congress or a State legislature. These judges are not chosen by the people, nor subject to review by them. This is arbitrary power, and the corporations have taken possession of it by simply naming a majority of the judges.

Gilbert E. Roe (in La Follette's, June-August, 1911) demonstrates that these courts put the poor man at a disadvantage to the rich man under the law, under "the assumption of risk" by the poor employee and the rule of "negligence of a fellow servant," etc.

Even President Taft, in his speech of September 16, 1909, said:

> We must make it so that the poor man will have as nearly as possible an equal opportunity in litigating as the rich man, and under the present conditions, ashamed as we may be of it, this is not the fact.

It was the fatal decision of the Supreme Court of the United States in the Dred Scott case, nationalizing slavery, which caused the Civil War. Lincoln declared this decision was based on falsehood; that it was unsound. There was no way to review it, no way to recall the court, no way to amend the reactionary Federal Constitution, and the most terrible war of the whole world followed because the people had no remedy available.

LEGISLATIVE RECALL.

I believe that the people of Arizona, of Oregon, and of California have a constitutional right to adopt popular recall in addition to legislative and automatic recall if they see fit. They are a free people, possessing full sovereignty, and have a right to choose their own public servants and impose the conditions of the public service.

It is an open secret that in California the Southern Pacific packed the California courts and that this was the reason why the people demanded popular recall and voted for it by over 3 to 1.

While I have not advocated popular recall for executive, legislative, or judicial offices where the people already have abundant means of protection by electing judges for a fixed tenure of office or by legislative recall, it is nevertheless my opinion that the people are more reliable than the legislature. It is more difficult to move the people

to any hasty or inconsiderate action. It is not difficult to move the legislature by caucus action, by logrolling, by lobbying, or by misrepresentation and by combining selfish interests, because the legislators are few in number, easily gotten together, and easily subjected to unfair influences. It is much more difficult to move the people than it is the legislature. The legislature may be stirred to some sudden, impetuous action by an eloquent speech, brilliant but specious. It may at times be tumultuous and have a riot, as at the recent close of the Pennsylvania Legislature. But when the people of a State, involving two or three hundred thousand people, go into the quiet and seclusion of the voting booth, face to face with their own several consciences, and for the general welfare cast their ballots they are free from passion, excitement, or undue influence. The people under these safeguards are more reliable than their representatives in caucus, convention, or legislature.

I very well understand that those who oppose putting power in the hands of the people do so on the theory that the people are very "excitable," "tumultuous," "turbulent," "unrestrained," "impulsive," and a variety of other pleasing adjectives intended to portray the people as an irresponsible mob.

This has been the Tory argument from the beginning of time. It has no merit. It has no substantial truth.

LIBEL ON THE PEOPLE.

The suggestion, for example, that the people would drag a judge from the bench by popular recall because of his upright conduct in extending the constitutional guaranties to some unpopular person is contrary to common sense and is a libel on the long-suffering common people.

The theory that the Constitution was framed by the people to prevent the brutality and tyranny of the majority over the minority is another fiction. The fact is, the skillful advocates of the minority have usually contrived by craft and underhanded means to paralyze the will of the majority by jokers put into various constitutions, especially the Federal Constitution, as I set forth in some detail in my reply to the Senator from Utah during the last session of Congress. The most conservative, sane force in this country is the rule of the honest majority. The rule of the majority leads to peace, to justice, to righteousness. The rule of the minority has nearly always been in the interest of the few against the interest of the many, and where it went too far the rule of the few has led to instability of government, of property, and to revolution.

It is but natural that those who are the advocates of privilege should adopt the Hamilton argument in favor of the rule of the few and point out the "dangers," the "brutality," and the "tyranny" of the rule of the majority.

I believe in the rule of the people, in giving them direct power, knowing that the American people are "safe and sane," that they are a religious, industrious, intelligent, and benevolent people, who will never deal unjustly with a judge or with any other public servant who is faithful to their interests and who merits their approval.

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