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Constitutional Revision - Judicial Selection - The Missouri Plan for New Mexico

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CONSTITUTIONAL REVISION—JUDICIAL SELECTION—THE "MISSOURI PLAN" FOR NEW MEXICO?

In 1933, a bill was introduced in the New Mexico legislature providing for election of judges on a nonpartisan ballot. The bill failed to pass.[1]

In 1935, following revision of the California judiciary the year before, the New Mexico State Bar Association met with a dozen state-wide organizations to discuss possible improvements in the method of selecting judges. The conference adopted a resolution favoring non-political selection of judges, but no specific plan was formulated.[2]

In 1950, the state bar association approved a draft plan for merit judicial selection by a near-unanimous vote. The plan was introduced in the 1951 legislature and defeated on the first vote by a large majority. After a significant amendment[3] the bill passed and joined seven other proposals submitted to the voters in a special election on constitutional issues alone. None passed.[4]

In 1967, the New Mexico Constitutional Revision Commission recommended adoption of a plan similar to the one defeated in 1951.[5] Both the 1950 plan and the 1967 proposed judicial articles

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1. Winters, *The New Mexico Judicial Selection Campaign—A Case History,* 35 J. Am. Jud. Soc'y 166, 167 (1952).

2. *Id.*

3. The original bill provided that an incumbent judge would be defeated for reelection "if a majority of those voting on the question vote against retaining him in office." The amendment added the words "and if the total number of votes cast on the question shall be at least fifty per cent of the total number of legal voters voting at the election." The Albuquerque Tribune and the Santa Fe New Mexican, although both declared themselves in favor of judicial selection reform, were unable to accept the amendment which made it virtually impossible to remove a judge from office. At that time, after forty years of statehood, in only four of all elections held did 50% of the total voters participate. Nine judges, at that time, had been defeated since statehood for reelection. *Id.* at 168, 170-71.

4. The judicial selection proposal fared worst of all proposals submitted to the voters, with 12,958 "for" to 21,935 "against." The judicial selection proposal did best generally in concentrations of Anglo-American population, worst in the northern and central counties where the Spanish-American vote predominated. The Spanish-Americans were apparently swayed by the argument that the new system would eliminate Spanish-American representation on the bench. The argument made headway, even though the Santa Fe New Mexican reported that only four of 51 district judges and one of 24 supreme court judges since statehood had Spanish names, and the situation could hardly deteriorate under the proposed system. *Id.* at 169-70.

5. Report of New Mexico Constitutional Revision Commission 85-86 (1967) [hereinafter cited as Commission Report]. Briefly, the 1951 plan provided for a nomination commission made up of members of the Board of Bar Commissioners for the supreme

were based on the nonpartisan judicial selection system in effect in Missouri since 1940, popularly known as the "Missouri Plan." The idea behind the Missouri Plan is that merit selection of judges is superior to partisan election. A number of states have agreed with Missouri, especially in recent years, and have either adopted parts of it, or have embraced the Plan as a package.[6] Only eight states remain with a totally partisan election system for judges.[7] New Mexico belongs to this dubious elite.

New constitutions have been approved in a number of states, and constitutional conventions are pending in Arkansas, Illinois, Massachusetts, Tennessee, and New Mexico.[8] Basic reappraisals of tradition-bound institutions are under way in almost every state of the Union. Such dramatic changes have taken place in the past few years that Judge Traynor, Chief Justice of the Supreme Court of California was prompted to issue a warning:

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court. For the district courts, two lawyers and two non-lawyers were to make up the nominating commission, but the supreme court appointed one of the non-lawyers. The make-up of the commissions drew criticism, again from the Albuquerque Tribune and the Santa Fe New Mexican, because "it gives the lawyers too much voice in the selection of judges." Winters, *The New Mexico Judicial Selection Campaign, supra* note 1, at 167, 171. Under the new proposal three members of the bar, three non-lawyers appointed by the governor, and the Chief Justice of the Supreme Court of New Mexico make up the nominating commission. Commission Report 85. Since the proposal leaves open the function of the Chief Justice except to designate him chairman of the commission, the make-up of the commission will foreseeably be again subject to the criticism of giving the lawyers too much voice in the selection of judges. For the history of the judicial reform movement in New Mexico between 1951 and 1962, see Winters, *Judicial Selection, 1951-1962,* 1962 N.M. St. B.J. 19.

6. Ala. Const. amends. LXXXVII, CX; Alaska Const. art. IV, §§ 5-9; Cal. Const. art. 6, § 26; Ill. Const. art. 5, §§ 10-11; Iowa Const. art. 5, §§ 15-18; Kans. Const. art. 3, § 2, Kans. Gen. Stat. Ann. §§ 20-119 to -138 (1964); Mo. Const. art. 5, § 29; Neb. Const. art. 4, § 2, art. 5, §§ 4-5, 7, 10, 15, 20-21; Okla. Stat. Ann. tit. 20, § 791 (1962); Vt. Stat. Ann. tit. 4, §§ 571-76 (Supp. 1968). Dade County, Florida, and Denver, Colorado, have also adopted the plan. *See* Dade County, Fla., Home Rule Charter § 6.01 (1964); City and County of Denver, Colo., Home Rule Charter §§ A13.8 to .8-3 (1964). Governor Scranton of Pennsylvania has taken the initiative and voluntarily appointed a commission to nominate candidates for Philadelphia judgeships. Executive initiative has also been taken by Governor Erbe of Iowa, Governor Volpe of Massachusetts, Governor Love of Colorado, Mayor Wagner of New York City, and Mayor Currigan of Denver, all of whom appointed nominating commissions. *See* 48 J. Am. Jud. Soc'y 117, 154-55, 157 (1965); *see also* Segal, *Nonpartisan Selection of Judges: Pennsylvania's Experiment,* 50 A.B.A.J. 830 (1964).

The American Assembly on the Courts has recommended that executives follow merit plan procedures in exercising appointive powers pending acceptance of the merit plan by the voters. *Recommendations of the 27th American Assembly on the Courts, the Public and the Law Explosion,* 49 J. Am. Jud. Soc'y 16 (1965).

7. The others are Arkansas, Kentucky, Louisiana, Pennsylvania, Tennessee, Texas, and West Virginia. Segal, *Judicial Selection and the County Bar Associations of Pennsylvania,* 39 Pa. B. Ass'n Q. 52 (1967).

8. Editorial, *Voters Approve Judicial, Constitutional Reforms,* 52 Judicature 182, 183 (1968).

> . . . [A] glacial force has been gathering momentum against the slag of years—the force of nationwide legal education, now generally recognized as the best in the world. Young lawyers have come along who are hospitable to improvement in the judicial process as well as in substantive law, and recent years have been marked by accelerating progress. Woe unto the state that fails to keep up with such progress. The quality of that state's justice signifies much to others about its education and government, and indeed about its future as a distinguished or backward member of the family of states.[9]

New Mexico is being offered a golden opportunity to join states which have brought their method of judicial selection up to date. The Missouri Plan provides the best known combination of selection based on merit, along with periodic elections in which incumbents are required to "run on the record." The New Mexico adaptation of the Plan, as recommended by the Constitutional Revision Commission, differs in important respects from the Missouri version.[10]

Briefly, the Missouri Plan provides for a nonpartisan nominating commission which screens candidates for judicial positions, and

9. Address by Roger J. Traynor, Virginia State Bar Association Midwinter Meeting, Feb. 10, 1967 in 53 Va. L. Rev. 1266, 1277 (1967). The subject of Judge Traynor's address included merit judicial selection, which he supports.

10. The proposed sections establishing the merit selection plan in New Mexico are as follows:

Proposed art. VI, § 11, Judicial Branch.
Filling Vacancies and New Positions.

The governor shall fill a vacancy or any newly created position in any judicial office in the state, other than that of magistrate, from a list of three nominees presented to him by the appropriate judicial nominating commission. If the governor should fail to make an appointment from the list within sixty (60) days from the day it is presented to him by such commission the appointment shall be made by the chief justice or the acting chief justice of the supreme court from the same list.

Magistrates shall be appointed to fill any newly created positions or vacancies by the chief justice of the supreme court.

To be eligible to hold office as a justice of the supreme court, judge of the court of appeals or judge of the district court, a person must be domiciled within the state, a citizen of the United States, and licensed to practice law before the supreme court of the state.

Proposed art. VI, § 12, Judicial Branch.
Judicial Nominating Commission.

Three (sic) shall be created a judicial nominating commission for the supreme court, court of appeals, and a judicial nominating commission for the nomination of judges for the courts sitting in each judicial geographical department or district. Each judicial nominating commission shall consist of seven members, one of whom shall be the chief justice of the supreme court who shall act as chairman. The members of the bar of the state in the geographical area for which the court or the department or district of the court sits shall by rule of the supreme court provide for the election of three of their number to be member(s) of such a commission, and the governor shall appoint three citizens, not members of the bar, from among the residents of the same geographical area. The terms of office and compensation for members of a judicial nominating commission shall be approved by law. No member of a judicial nominating

chooses the best three for the office in question. The three names are submitted to the governor, who chooses one. The judge then takes office, and is required, periodically, to "run on his record" with no opposition. If he is not reinstated by the voters, the selection process begins again.[11]

Selection of the nominating commission members under both systems is the same, with the exception that Missouri emphasizes that the commission is to be nonpartisan, while the New Mexico version avoids the subject of nonpartisanship entirely.[12] Each plan selects three commission members from among members of the bar, and

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commission shall hold (office) in any political party or be eligible for appointment to a state judicial office as long as he is a member of such a commission.

Proposed art. VI, § 13, Judicial Branch.

Term of Office.

The term of office of each justice of the supreme court, district court or court of appeals, or magistrate, shall expire on the death, retirement or removal of such justice, judge or magistrate, or upon his rejection by the electorate.

At the next general election following the expiration of four years from the date of appointment, and thereafter, as hereinafter provided, so long as he retains his office, every justice, judge and magistrate shall be subject to approval or rejection by the electorate in such manner as the legislature may provide, every four years in the case of a magistrate, every six years in the case of a district judge, and every eight years in the case of justices of the supreme court and judges of the court of appeals. In the case of a justice of the supreme court, the electorate of the entire state shall vote on the question of approval or rejection.

In the case of judges of the court of appeals, district court, and magistrates, the electorate of the district or districts in which the division of the court of appeals or districts to which he was appointed is located shall vote on the question of approval or rejection. Any other justices or judges of such other courts as may be created by law shall be selected and serve such terms as may be prescribed by law.

Proposed art. VI, § 14, Judicial Branch.

Limitations.

No person who holds judicial office in the supreme court, court of appeals, district court or magistrate court shall engage in the practice of law, hold any other paid office, position of profit or employment under the state, its civil divisions or the United States, nor shall he run for elective office other than the judicial office which he holds, or directly or indirectly make any contributions to, or hold any office in, a political party or organization, or take part in any political campaign other than for the office which he holds.

The differences between the proposed sections quoted above and the Missouri version of the merit plan are explained *infra*.

11. Mo. Const. art. 5, § 29(d); proposed art. VI, § 12, *supra* note 10. Since the major motive force behind the drive for merit judicial selection is elimination of partisan politics from the selection process, it would seem highly appropriate that some mention be made, in the new section, of the requirement that partisan political considerations are to be excluded. Missouri mentions the requirement of nonpartisan selection in the title of section 29, Nonpartisan selection of judges, the title of subsection 29(d), Nonpartisan judicial commissions, and again in the text of 29(d). This apparently has been found sufficient protection for the nonpartisanship requirement in Missouri. Colorado favors bipartisanship as the best way of keeping politics out of the system. *See* 48 J. Am. Jud. Soc'y 154 (1964).

12. *See* notes 10 & 11, *supra*.

three non-lawyer members from among the general public by gubernatorial appointment. Missouri, however, provides that:

> [T]he terms of office of the members of such commission shall be fixed by the supreme court and may be changed from time to time, but not so as to shorten or lengthen the term of any member then in office. . . . All such commissions shall be administered, and all elections provided for under this section shall be held and regulated, under such rules as the supreme court shall promulgate.[13]

New Mexico's proposal states only that "the terms of office and the compensation for members of a judicial nominating commission shall be as approved by law."[14] Elections of bar members to the commissions are provided for by supreme court rule. Responsibility for the actual operation of the nominating commissions is left open in New Mexico, while the supreme court in Missouri must provide procedures to ensure that the commission functions smoothly.

A hard and fast procedure need not be set up in the new constitution. Nevertheless, consistent with efficient management, some responsibility should be outlined in the constitution. Whether the supreme court, the governor, or the commission itself is to set procedural guidelines should be clarified. Where is the authority to investigate an applicant's past history, and to call witnesses? Who determines the scope of inquiry, and whether the completed product is public or confidential information? The authority merely to nominate candidates without the means by which the commission members can inform themselves about the qualifications of applicants for judicial positions is an empty one indeed.

The judge under the Missouri system may not "take part in any political campaign."[15] Under the suggested New Mexico provision, in comparison, the judge may not "take part in any political cam-

13. Mo. Const. art. 5, § 29(d). Note that Missouri felt that the term of office of commission members might be used as a pressure point for improper purposes, and provided that terms of those in office would be protected from changes directed at the commission member personally. The New Mexico proposed section (Art. VI, § 12, text *supra,* at note 10), without protections which Missouri provides, is open to the criticism that the legislature can vary the terms of any or all members while they are serving. This is not to say that a real danger to the system exists from this sort of thing. On the other hand an ounce of prevention would do no harm, and would further assure the independence of the commissions from political considerations.

14. Proposed art. VI, § 12 *supra* note 10.

15. Mo. Const. art. 5, § 29(f). Prohibition of political activity by judges.

No judge of any court of record in this state, appointed to or retained in office in the manner prescribed in sections 29(a)-(g), shall directly or indirectly make any contribution to or hold any office in a political party or organization, or take part in any political campaign.

paign *other than for the office which he holds.*"[16] (emphasis supplied) Both Missouri and New Mexico would prohibit direct or indirect contributions to, or holding office in a political party.

The difficulty with the New Mexico modification of the Missouri provision is that campaigning for office by the incumbent judge is sanctioned. The Missouri Plan was drafted with the specific goal of eliminating the necessity for time-wasting political campaigns by judges. Campaigns cost money, and the money traditionally comes from the judge's political party, as well as other sources. Although the judge may not, under the proposed system, contribute to a political party, there is no mention made of accepting funds from political sources to finance a campaign. The rationale for allowing incumbents to campaign when, under the merit system, they are unopposed is difficult to understand.

Admittedly there is no positive duty to campaign. But ingrained habits die slowly, and it is reasonably certain that if the judge is given the option of a partisan political campaign or no campaign, he may feel forced, believing the public expects it, to take to the hustings and leave his judicial duties behind.

The aim of the merit plan is to remove partisan politics, as far as possible, from judicial selection. The impossibility of removing politics entirely is admitted. Judge Garwood, retired judge of the Texas supreme court, explains that the "politics" the merit plan seeks to eliminate are:

> . . . certainly not politics in the Aristotelian sense or that of the deep interest, with which any educated citizen, especially a judge, should follow and understand political facts, ideas and developments of his generation. The "politics" sought to be avoided as inconsistent with the recruitment of the best judiciary and with the best performance of any judiciary are . . . politics which . . . require judicial incumbents . . . to devote more time and worry than they should to campaign and pre-campaign activities, the details of which are well known to every holder of elective office and include the solicitation of money and other assistance from the very people whose cases the incumbent, if successful, may later have to decide.[17]

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16. Proposed art. VI, § 14, *supra* note 10.

17. Garwood, *Judicial 'Planned Parenthood,'* 26 Tex. B.J. 369-70 (1963). This article was written in answer to a previous article contending that "politics" in the broad sense cannot be removed from judicial selection, and stating, "it may be that the process of refinement that takes place in the political cauldron can be a wholesome ingredient in the judicial personality." Stovall, *Judicial Babies and Constitutional Storks,* 26 Tex. B.J. 201, 202 (1963).

It should be noted that even in states in which the merit plan has been recommended and defeated, bar associations are for the most part firmly behind the plan. A poll of

If the judge is allowed to conduct a political campaign for his office, the effort to remove partisan politics from judicial selection will be wasted. The judge's duty of impartiality is difficult enough without adding unnecessary political considerations.

The merit plan has been in operation in Missouri since 1940. In 1964, approximately 20% of the members of the Missouri bar were asked their opinion of the merit system. The answer was this:

> [A]fter twenty-five years of experience with the merit plan, Missouri lawyers are for the most part satisfied with this system of selecting judges. It is particularly significant that the members of the Bar who have lived with it most closely . . . are its strongest supporters.[18]

For selection of circuit judges (equivalent of New Mexico district judges) the Missouri lawyers preferred the merit plan by 61%. Sixteen percent preferred nonpartisan elections, and 11% had other suggestions or expressed no opinion.[19] Only 1% preferred to see the governor appoint judges on his own initiative, a practice that commonly occurs in partisan election states like New Mexico.[20] In Kansas City and St. Louis, where circuit judges are chosen by merit selection, the Plan is supported by 79% and 70% margins respectively.[21] In addition to a showing of support for the merit plan, the major impression from the Missouri poll is that Missouri lawyers

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Texas judges shows 49.6% for the merit plan, 28.5% for election but for a longer period, 20% for the present system of partisan elections, and 1.9% for gubernatorial appointment. Texas had an opportunity to embrace merit selection, but did not take it. *See* Henderson & Sinclair, 1 *The Selection of Judges in Texas* 104 (Public Affairs Research Center, University of Houston, 1965). Florida also turned down merit selection, over endorsement by the Florida bar. *See* Editorial, *Voters Approve Judicial, Constitutional Reforms,* 52 Judicature 182, 183 (1968); *Citizens and the Courts,* 48 J. Am. Jud. Soc'y 152 (1964).

18. Watson, *Missouri Lawyers Evaluate the Merit Plan for Selection and Tenure of Judges,* 52 A.B.A.J. 539, 542 (1966).

19. *Id.* at 540.

20. In New Mexico, for example, two-thirds of the general trial judges in 1964 had been originally appointed by the governor. Winters & Allard, *Two Dozen Misconceptions about Judicial Selection and Tenure,* 48 J. Am. Jud. Soc'y 138, 140 (1964). From 1948 to 1957, more than 56% of supreme court judges in elective states came to the bench by gubernatorial appointment. *Id.* Pennsylvania, one of the other states which elects all its judges on a partisan ballot, also had an overwhelming percentage of its judges initially appointed. Segal, *Judicial Selection and the County Bar Associations of Pennsylvania,* 39 Pa. B. Ass'n. Q. 52 (1967). Since 1938 in Georgia, 95% of the appellate judges have been appointed by the governor rather than elected to office. No incumbent appellate judge has been defeated in an election for 45 years. Hall, *Merit Selection and Merit Election of Judges,* 4 Ga. St. B.J. 169 (1967). Thus, even in so-called elective states, it is clear that the choice put to the voters is normally a choice of ratifying the governor's choice or choosing someone else. This is much the same sort of choice offered the voters under the merit plan, but with merit plan safeguards built in.

21. Watson, *supra* note 18, at 540.

overwhelmingly favor divorcing judicial selection from party politics.

These results after 25 years of experience with the merit plan provide a powerful incentive to adopt the plan in New Mexico. Because of the unavailability of in-depth studies of the effects of the merit plan, a certain amount of faith is required that the plan will work better than the present system of partisan election. The lack of systematic inquiry may be accounted for by the difficulty of measuring the qualities which separate a good judge from a better one. The belief of Missouri lawyers that they are getting better judges may or may not be accepted as indicative of objective fact that better judges are chosen under the merit system. What is clearly true is that better judges should be chosen under the merit system, if only from a common-sense, or even a theoretical, point of view.

The elimination of traditional partisan politics from the judicial selection process at the very least removes pressures the judge has heretofore faced. The Missouri experience shows that candidates who would not otherwise accept a judicial position are willing to be considered if the political aspects of campaigning and fund-raising are eliminated. This insures a wider range of candidates. The judicial selection commission is required to choose candidates on principles of merit rather than political appeal to the voters. Disentanglement from political ties encourages independent and impartial attention to the merits of cases. Prohibition of any sort of campaign, political or otherwise, excludes the time-consuming activities previously required for re-election, allowing complete devotion to duty, and as an incidental benefit, giving the taxpayer more work for his money.

In order to enjoy the benefits of merit selection, the entire system must be nonpartisan. The proposed judicial article does not now require nonpartisan selection by the governor, or nonpartisan selection by the nominating commission, although the comments to the Revision Commission report specifically state that the evils of party politics are to be avoided.[22]

The nomination commission should be morally bound to exclude partisan considerations from their deliberations. The governor will be responsible to the voters on election day for any partisan transgressions in appointments. Missouri governors have taken the duty of nonpartisanship seriously. In a strongly Democratic state, of the 60 judges appointed under the merit plan, 70% have been Demo-

22. "The use of a judicial nominating commission would, it is felt, free the courts from the undesirable effects of party politics. . . ." Comments to Proposed art. VI, § 11, *supra* note 10. Commission Report 84.

crats, 30% Republicans.[23] There is no reason to suppose that New Mexico governors will be less responsive to a new constitutional duty of nonpartisanship.

Under the proposed New Mexico article, the legislature controls both terms of office and compensation for the members of the nominating commission.[24] In view of the Missouri experience with its legislature,[25] it might be the better part of valor to ensure at least the tenure of commission members either by supreme court rule or by constitutional provision. The danger, if a remote one, is political control of what must be a nonpartisan commission, deaf to political considerations. Missouri has been satisfied with control of term of office and with administration of elections of commission members by supreme court rule.[26] This sort of provision included in the constitution would provide adequate protection from partisan political pressures.

Perhaps the biggest difference between the suggested New Mexico article and the concept of the Missouri Plan is that New Mexico would allow campaigns to continue in office by incumbents. This permission strikes at the very heart of the merit system, which hypothesizes elimination of partisan politics from judicial selection. Assuming that the judge feels required to campaign, where does the money come from? If it comes from the political party coffers, or if partisan support in various forms is offered, all the pressures sought to be eliminated reappear. Gone is the desired independence, impartiality and freedom from partisan considerations in judicial decision-making. Gone, too, is the time sought to be saved by prohibiting campaigns. What of the prospective judicial candidate who is willing and well-qualified to serve as a judge, but who refuses to become embroiled in the expense and hardship of a campaign? How will he react to the option that he may campaign if he desires, but he need not? The foreseeable indirect pressure to campaign, including the pressure of tradition, may be enough to discourage him from seeking office in the first instance. Thus we might discourage the very persons we seek to make a part of a judiciary presently filled with judges elected under the partisan system.

If there are valid reasons for keeping the judge's privilege to campaign for the office which he holds, that would be a different matter.

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23. Watson, *supra* note 18, at 542 n.16.

24. Proposed art. VI, § 12, *supra* note 10.

25. The Missouri General Assembly, after 25 years under the merit plan, has failed to provide the manner of submitting the issue of merit selection to the voters of the circuits in which it could be adopted. *See* Mo. Const. art. 5, § 29(b); Belt, *Small County Opposition to the Nonpartisan Court Plan*, 22 Mo. B.J. 289 (1966).

26. *See* Mo. Const. art. 5, § 29(d).

Under what circumstances would a judge feel compelled to campaign? Hypothetically, an extremely unpopular decision might make the judge feel the need to campaign. As a practical matter, judges selected under the merit system are invariably re-elected.[27] For this reason, one of the major complaints about the merit system was that election "on the record" is not likely to remove judges. The Missouri problem, however, was not with unpopular decisions of the judges, but with incompetence because of advanced age, and in some cases, misbehavior.[28] In New Mexico, however, other means of dealing with incompetence and misbehavior are provided.[29] Defeat for re-election has not been an adequate safeguard, even under the partisan elective system. Thus as a practical matter, judges have not been removed from office by the voters for unpopular decisions,[30] and there is no need to allow them the privilege of campaigning to protect themselves from the effects of unpopularity.

There is nothing sacred about partisan election of judges. In 1789, none of the original states chose their judges by election.[31] Describ-

27. The Missouri experience has been that judges chosen under merit selection have, even with periodic submission to the voters, a high degree of job security. A number of factors contribute to this. First, better judges are probably chosen under the merit plan. At least an overwhelming number of those connected with the legal profession consider this to be so. Second, ways of removing unqualified judges by other means have been made more efficient and responsive to public opinion. Third, voters choose between approval or rejection, without knowing who will replace the judge they reject until the governor has approved a commission nomination, which is not made until the vacancy occurs. Perhaps the uncertainty of the future choice "makes us rather bear those ills we have than fly to others that we know not of." Hamlet, III, 1. *See, e.g.,* Watson, *supra* note 18; Schroeder & Hall, *Twenty-five Year's Experience with Merit Judicial Selection in Missouri,* 44 Tex. L. Rev. 1089, 1094-95 (1966).

Many bar associations across the country have declared themselves in favor of the merit system as providing better judicial selection. *See, e.g.,* Laub, *Issues Before the Judiciary Committee of the Pennsylvania Constitutional Convention,* 39 Pa. B. Ass'n. Q. 390, 395 (1968); Lindsay, *The Selection of Judges,* 21 Record of N.Y.C.B.A. 514, 516-17 (1966); Roberts, *Twenty-five Years under the Missouri Plan,* 49 J. Am. Jud. Soc'y 92, 95-96 (1965); *Citizens and the Courts; Court Modernization Conferences to Continue,* 48 J. Am. Jud. Soc'y 152 (1964).

28. Watson, *supra* note 18, at 542.

29. *See* N.M. Laws 1968, ch. 48, establishing a judicial standards commission and judicial conference; Proposed art. VI, §§ 15-17, Commission Report 87-89, establishing a commission on the judiciary for disciplinary and removal purposes.

30. *Cf.* Watson, *supra* note 18, at 542. Ordinarily, there is no mention of voters removing judges on election day under the merit system for *any* reason, much less unpopularity. *See, e.g.,* Rosenberg, *The Qualities of Justices—Are They Strainable?,* 44 Tex. L. Rev. 1063, 1097 (1966). Rosenberg contrasts the situation in merit selection states in which judges are returned to office despite political affiliation in Democratic or Republican landslide years compared to the opposite situation in partisan election states in which the judges sweep in and out of office, regardless of merit, based on the strength and direction of the political winds. *Id.*

31. Hunter, *A Missouri Judge Views Judicial Selection and Tenure: Variations of the Society's Merit Plan,* 48 J. Am. Jud. Soc'y 126, 129 (1964).

ing the history of the move toward popular election of judges, one writer commented:

> . . . Mississippi may have been the first to cast "the chances of judicial selection upon the dirty waves of party politics, (but) it was the New York Constitutional Convention which first imparted respectability to the seductive innovation. . . ."[32]

The New York State Bar Association now feels that a return to the appointive system, specifically the merit selection system is called for because:

> It cannot be denied . . . that the appointive system offers a superior opportunity for ascertaining the merits of a candidate and deliberation upon his qualifications. The appointment can be considered apart from the excitement and bias of a campaign. . . . Candidates are relieved of the expense of conventions and elections. The legitimate expense of a candidacy under the elective method is very considerable and this expense presents an opportunity for political leaders to impose high assessments upon candidates for judicial office. . . . Men will accept appointment who would not go through the political servitude now necessary to obtain office.[33]

Long before the controversy over merit judicial selection arose, Chief Justice Marshall summed up his feelings this way:

> The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important that he (the judge) should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . 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.[34]

Eighteen years ago, New Mexico might have been in the vanguard of forward-looking states adopting merit selection. That opportunity is past, and the opportunity now presented is that of joining those progressive states which have chosen merit selection.

BRUCE KEITH

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32. Niles, *The Popular Election of Judges in Historical Perspective,* 21 Record of N.Y.C.B.A. 523, 527-28 (1966).

33. *Quoted in* Lindsay, *The Selection of Judges,* 21 Record of N.Y.C.B.A. 514, 516-17 (1966).

34. Proceedings of the Virginia State Convention, 1829-30, *quoted in* O'Donoghue v. United States, 289 U.S. 516, 532 (1932).