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Observations on the Wyoming Experience With Merit Selection of Judges: A Model for Arkansas

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OBSERVATIONS ON THE WYOMING EXPERIENCE WITH MERIT SELECTION OF JUDGES: A MODEL FOR ARKANSAS*

*by Professor Lawrence H. Averill, Jr.***

TABLE OF CONTENTS

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I. INTRODUCTION

The debate over how Americans should select state and local judges has reached the point of personal philosophy. There is little that can be added to the intellectual discussion considering the enormous amount of legal scholarship and writing that has been committed to the subject.[1] The American Judicature Society has spent over fifty years analyzing, evaluating, and espousing judicial selection reform.[2] Its publication *Judicature* has been full of articles discussing the top, the bottom, and every edge of the judicial selection issue. The legal literature in other law reviews is equally rich and varied. All aspects of the matter have been discussed from the standpoint of theory, opinion, history, sociology, and empirical study. This article will make no attempt to review, compare, or analyze this library of information. My purposes are more refined and personal.

My credentials and motivation for commenting on judicial selection and expressing my thoughts on the matter derive from the observations concerning the judicial selection processes I made during my seventeen years as a professor at the University of Wyoming College of Law and my involvement in Wyoming State Bar activities. During these years the State of Wyoming had the wisdom to rewrite the judicial article in its constitution and to include a change from a nonpartisan election system to a merit selection plan.[3]

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1. One frequent commentator on the subject suggests that judicial selection is the most written about subject in legal publications. Philip L. DuBois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 31 (Special Issue, May 1986) ("Although surely no one has made a formal count, it is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past fifty years as the subject of judicial selection.")

2. *See* Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990); Glenn R. Winters, *A Half Century in Retrospect*, 72 JUDICATURE 92 (1988).

3. Merit selection, generally, refers to "[a] permanent nonpartisan commission of lawyers and nonlawyers that initially and independently generates, screens and submits a list of judicial nominees to an official who is legally or voluntarily bound to make a final selection from the list." ALLAN ASHMAN & JAMES J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 12 (1974). Excluded from this definition are systems that use a strict appointment or popular contested elections as the selection system. *Id.* The "merit" part of the name refers to the supposition that the commission will select its nominees on the basis of the members' perceptions of good qualities for judges including aspects of character, experience, and ability. *See infra* note 120 and accompanying text.

It goes without saying that no system is perfect. Each system has its selection disadvantages and problems.[4] The absolute best

4. The issue of judicial selection has attracted a significant number of commentators. The following materials contain a sampling of the literature during the last 10 years. Lawrence R. Yetka & Christopher H. Yetka, *The Selection and Retention of Judges in Minnesota*, 15 HAMLINE J. PUB. L. & POL'Y 169 (1994); Maura S. Schoshinski, Note, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839 (1994); Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study In Constitutional Stagnation*, 43 DEPAUL L. REV. 269 (1994); William J. Harbison, *Passive Or Active?*, 24 MEM. ST. U. L. REV. 183 (1994); Bridget E. Montgomery & Christopher C. Conner, *Partisan Elections: The Albatross of Pennsylvania's Appellate Judiciary*, 98 DICK. L. REV. 1 (1993); Missouri Task Force on Gender and Justice, *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485 (1993); Kurt E. Scheuerman, Comment, *Rethinking Judicial Elections*, 72 OR. L. REV. 459 (1993); W.J. Michael Cody, *Special Ethical Duties for Attorneys Who Hold Public Positions*, 23 MEM. ST. U. L. REV. 453 (1993); Frank Upham, *The Role of Lawyers in Social Change: United States*, 25 CASE W. RES. J. INT'L L. 147 (1993); David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1 (1992); Orrin W. Johnson & Laura J. Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH. L. REV. 525 (1992); Thomas P. Prehoditch, *The Voting Rights Act and Judicial Selection Litigation: An Evaluation of Remedial Options*, 11 REV. LITIG. 523 (1992); John D. Felice & John C. Kilwein, *Strike One, Strike Two . . .: The History of and Prospect for Judicial Reform in Ohio*, 75 JUDICATURE 193 (1992); Shawn Fremstad, Note, *State Judicial Elections and the Voting Rights Act: Defining The Proper Remedial Scheme*, 76 MINN. L. REV. 101 (1991); Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529 (1991); April D. Dulaney, Comment, *A Judicial Exception for Judicial Elections: "A Burning Scar on the Flesh of the Voting Rights Act"*, 65 TUL. L. REV. 1223 (1991); Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184 (1990); John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837 (1990); Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990); Barbara L. Graham, *Judicial Recruitment and Racial Diversity On State Courts: An Overview*, 74 JUDICATURE 28 (1990); Beth M. Henschen et al., *Judicial Nominating Commissioners: A National Profile*, 73 JUDICATURE 328 (1990); Philip L. Dubois, *Voter Responses to Court Reform: Merit Judicial Selection on the Ballot*, 73 JUDICATURE 238 (1990); Bernard Hirschhorn, *Richard Spencer Childs: The Political Reformer and His Influence on the Work of the American Judicature Society*, 73 JUDICATURE 184 (1990); William M. Pearson & David S. Castle, *Alternative Judicial Selection Devices: An Analysis of Texas Judges' Attitudes*, 73 JUDICATURE 34 (1989); Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146 (1988); John M. Scheb, II, *State Appellate Judges' Attitudes Toward Judicial Merit Selection and Retention: Results of a National Survey*, 72 JUDICATURE 170 (1988); Franklin S. Spears, *Selection of Appellate Judges*, 40 BAYLOR L. REV. 501 (1988); Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988); Glenn R. Winters, *A Half Century in Retrospect*, 72 JUDICATURE 92 (1988); John J. Hill, Jr., *Taking Texas Judges Out*

person to serve as judge is not necessarily selected under either an election or merit selection system, or any other process usually mentioned. Quality is a subjective matter: one not easily defined. It would be difficult to empirically prove that one system always selects a better qualified judge than any other system.[5] How any individual person will actually serve as a judge is a prediction that is impossible to make under any selection system. It is clear that one's opinion on this matter reflects one's personal values and philosophy about law and the judicial system.

Despite these caveats, it is my firm opinion that a merit selection system based on the modified Missouri Plan[6] offers the best opportunity for, and on average results in, selection of an attorney to serve as judge who has better professional credentials than the election system would select. It was my feeling that as a group the judges I saw selected under the merit selection plan had higher professional credentials and proved to be better judges than the

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of Politics: An Argument for Merit Election, 40 BAYLOR L. REV. 339 (1988); Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449 (1988); Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207 (1987); Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31 (Special Issue, May 1986); Richard A. Watson, *Observations on the Missouri Nonpartisan Court Plan*, 40 SW. L.J. 1 (Special Issue, May 1986); Theodore McMillian, *Selection of State Court Judges*, 40 SW. L.J. 9 (Special Issue, May 1986); Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53 (Special Issue, May 1986); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperior's Clothes of American Democracy?*, 2 J.L. & POL. 57 (1985).

5. One author contends that the qualifications of merit selected judges are indistinguishable from those of judges selected under an election system. Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509 (1978). *But see infra* note 8. The key to this debate is dependent upon how one defines quality. There are no universally agreed upon standards. *See* Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 111-13 (Special Issue, May 1986).

6. Popularly known as the Merit Plan or the Missouri Plan, named after the first state to adopt the system in 1940. For a detailed discussion of the historical development of the plan, see Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529, 535-37 (1991); Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990); Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQ. L. REV. 61 (1968). Missouri uses the merit selection system only for its supreme court, its court of appeals, and several circuit courts; all other courts use the partisan election system to select and retain judges. 30 THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 191 (1994) [hereinafter THE BOOK OF STATES].

prior elected group of judges. I can not quantitatively prove that point. In addition, and I believe just as important, the merit selection system functions with significantly lower societal costs[7] than an election system. Consequently, the law, the judiciary, and the judicial system are benefitted by a merit selection system.

The primary reasons for change in a judicial selection system are: (1) to obtain a better qualified, diversified judiciary;[8] (2) to eliminate adverse practices and results; and (3) to improve the confidence of the populace in the judicial system. It is my belief that the merit selection process is best designed to accomplish these ends. My conclusion is reached with full understanding that the merit selection system is not without its problems and that some commentators sincerely view this matter differently.[9] In this Article, I will try to explain my rationale.

II. Preliminary Matters

A. Selection Factors

When judicial selection processes are compared and analyzed, primary emphasis ordinarily concerns the particular methods by which judges are initially selected for their positions and how they are retained in those positions. In actuality, however, the place of the judiciary in relation to the political process depends on a large number of other factors.[10] Not only are the particular initial selection

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7. Within the term "costs" I am including economic, psychological, and ethical considerations.

8. One study indicated that merit selection has had the effect of selecting more professional judges and fewer politically active lawyers to the bench. John M. Scheb, II, *State Appellate Judges' Attitudes Toward Judicial Merit Selection and Retention: Results of a National Survey*, 72 JUDICATURE 170 (1988).

9. The current or modified versions of the election system have several advocates. *See, e.g.*, Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L.J. 31 (Special Issue, May 1986) (advocating typical election system); Maura A. Schoshinski, Note, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839 (1994) (supporting a financially and ethically structured election system); Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529 (1991) (election preferred).

10. *See* Dubois, *supra* note 1, at 33; Robert P. Davidow, *Beyond Merit Selection: Judicial Careers Through Merit Promotion*, 12 TEX. TECH. L. REV. 851, 868-86 (1981); Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L. REV. 409, 432-51 (1981); Lawrence E. Walsh, *The Attraction and Selection of Good District Court Judges*, 39 WASH. & LEE L. REV. 33, 34-35 (1982).

and retention systems significant, but the other rights, responsibilities, and privileges that apply to judicial offices are also important. These collateral factors include basic qualification standards,[11] judicial salaries,[12] term lengths,[13] ethical and disciplinary rules and procedures, jurisdiction and stature of the judicial office,[14] outside work opportunities,[15] judicial office resources,[16] and the various factors relating to retirement[17] and other fringe benefits.[18]

These factors interrelate in various ways in the decision making processes of all those who decide to seek and to stay in judicial offices. Those persons who seek judicial office may respond to different professional and personal stimuli. Some of these incentives may be more important in more situations than others. A single factor may be determinative for one individual and be of no importance to another. For example, a position on the state supreme

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11. Age and years of relevant experience are the primary criteria and may disqualify some young or recent members of the bar; otherwise, these limitations are not very important.

12. Regardless of the method used to select judges, the relative comparison of judicial salaries to other comparable endeavors for lawyers is important in determining the quality and number of attorneys who may be interested in judicial positions. Comparative salaries are crucial to the recruitment and retention of a high quality judiciary. When states have allowed judicial salaries to become inadequate, the number of laywers who will seek judicial positions decreases, and the number of sitting judges who leave the judiciary increases. *See, e.g.*, MISSOURI BAR ASSOCIATION SPECIAL COMMITTEE TO REVIEW AND EVALUATE THE MISSOURI NON-PARTISAN COURT PLAN, REPORT TO THE BOARD OF GOVERNORS OF THE MISSOURI BAR (Jan. 15, 1986). In election selection systems, however, high judicial salaries engender fiercely competitive elections.

13. Positions with longer terms are more desirable and therefore probably attract a larger number of interested candidates. If a person considering whether to seek a judicial position is going to give up her or his current professional activities, he or she may evaluate the possibility of serving only a single term.

14. Obviously, appellate court positions may be more attractive to some lawyers than trial court positions, and vice versa. Appellate court positions are generally considered more prestigious and thus are more conveted.

15. Only part-time judicial positions permit outside practice or interactive professional activity beyond volunteer work. The need to continue such endeavors may disqualify some attorneys.

16. Whether the judicial position includes an adequate staff and budget for the judge may be important.

17. When retirement may occur and when it is mandatory are both important factors. For example, if retirement benefits do not vest until the judge serves more than one term, the attorney considering a judicial office may be concerned about the likelihood of reelection or retention. Retirement ages are the reverse of minimum age qualifications for the positions. If one must retire at 70, attorneys who cannot qualify for retirement benefits by the time they reach that age are not going to seek judicial office. In other words, retirement age operates at a disqualifier.

18. Some matters related to pensions, such as dollar amount, vesting, and survivorship protections, may be important.

court, obviously, will attract a different pool of candidates than would a trial judge or municipal judge position. Clearly, high salaries for judicial positions, a phenomenon not prevalent in state court systems, would also greatly affect the pool of candidates.

Aside from these important but peripheral factors, the selection system for initial appointment of judges is probably the most important factor for most persons who may seriously consider a judicial post. For example, there are undoubtedly many attorneys who are well qualified for judicial positions, but who will not seek judicial positions if required to run in an election in order to initially obtain a judicial office.[19] In other words, an election system is self-selecting[20] or,

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19. A common phenomenon in elective systems states is that many judges become judges initially by the appointment of the governor of the state. The recipient of the appointment will then often run unopposed as an "incumbent judge" in his first election. *See* David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 26 (1992); Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 65-67 (Special Issue, May 1986). In effect, the election system becomes an informal appointment system without the benefit of the structural safeguards and quality control of a formal merit system.

Although the current law in Arkansas prohibits those persons who are appointed to fill out unexpired terms from succeeding themselves in the very position to which they have been appointed, this restriction has been avoided in some situations. ARK. CONST. amend. XXIX, §§ 1-2. There have been examples, particularly in Pulaski County where multiple judgeships are up for election, where an appointed judge will run as an "incumbent judge" either for another vacant similar judgeship, or by arranging with a previously elected incumbent judge to switch judicial positions with the appointed judge so that both judges can run as "incumbent judges." Although this probably conforms to the letter of the law, it certainly does not conform to the spirit of the law, which was to prohibit an appointed judge from having an advantage in seeking elections to the positions to which the judge had been appointed. Notwithstanding the merits of this avoidance technique, this approach certainly raises questions concerning the efficacy of the election system as the initial appointment system.

One of the problems of the "cannot succeed" rule is that it effectively prevents a governor from setting up an informal advisory panel to advise the chief executive on judicial appointment matters. *See*Case, *supra*, at 26-29. The use of this informal panel can metamorphose an otherwise traditional election system into a quasi-formal merit selection plan, depending on the tenure of the governor and whether successor governors retain it.

20. *See* Case, *supra* note 19, at 10-11. Mr. Case concluded:

> The expensive and contentious political climate which permeates partisan elections may also deter highly qualified and desirable candidates from seeking judicial office. An elected judge's equivocal job security, inadequate compensation, the continual campaigning and participation in competitive politics, and a system that rewards the politically skillful, rather than those with superior judicial credentials, are among the factors that discourage many well-qualified lawyers from pursuing an elective judgeship. This is said to create "an implicit self-selection effect" that eliminates many of the most qualified before the selection process even begins. Case, *supra*

more accurately, self-disqualifying. For the reasonably qualified attorney, a merit selection system possesses fewer factors that will discourage candidacy for a judicial office.[21] Consequently, the pool of potential attorneys, although somewhat different in composition,[22] should be a larger pool than the pool of attorneys who would seek judicial office through an election system. In turn, a larger pool should provide a base for attracting better candidates and assumably better judges.

B. Policy Issues in Contention

The major contentions over what is the best method of selecting judges center on one's opinion concerning the following attributes of the system:

1. the degree to which judicial selection should be separated from the pressures of political processes;
2. the degree to which an election process should be part of the selection processes;[23]
3. the degree to which any selection method imposes undue costs and inefficiencies on the judicial system without comparable benefits;
4. the degree to which any selection method imposes strains on the ethical stature of the judicial system without comparable benefits;
5. the degree to which any particular selection method adversely affects the number and quality of the candidate pool;[24] and,

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note 19, at 10-11 (footnotes omitted); *see also* John D. Felice & John D. Kilwein, *Strike One, Strike Two . . .: The History of and Prospect for Judicial Reform in Ohio*, 75 JUDICATURE 193, 196 (1992); PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 24 (1980).

21. *See supra* note 8.

22. A merit selection system may and should discourage attorneys from participating who do not have good professional reputations or who have had ethical difficulties. Unfortunately, election systems have sometimes had the opposite result. Candidates with undistinguished careers and even ethical committee reprimands have been elected because of the electorate's interests in nonqualification criteria. *See infra* note 69.

23. "It may be that society accepts the goal of accountability for judges without recognizing its meaning like the voters in the study in Lubbock who did not know anything about the judges for whom they were voting, but liked the idea of voting for them." Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 117 (Special Issue, May 1986) (citing Johnson et al., *The Salience of Judicial Candidates and Elections*, 59 Soc. Sci. Q. 371, 376 (1978)).

24. One commentator succinctly states the problem: "The Model Code

6. the degree to which any selection method adversely affects or limits the diversity of those who participate in the selection processes.

The general aims of a judicial selection method[25] can be summarized as follows:

1. to assure judicial independence;
2. to recruit the highest quality judiciary;
3. to provide for accountability;
4. to create a representative judiciary; and,
5. to maintain public confidence in the fairness and integrity of the judicial system.

C. Principal Selection Systems

There are a variety of selection methods that are used by the various states.[26] The principal groupings of methods include the following:

1. partisan elections
   a. for all courts, and
   b. for selected courts;
2. nonpartisan elections
   a. for all courts, and
   b. for selected courts;
3. merit selection through a nomination committee (commission) and executive selection with a subsequent retention election for term continuation;[27]

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of Judicial Conduct imposes requirements, such as independence and fairness, that are simply incompatible with judicial elections." Maura A. Schoshinski, Note, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO.J. LEGAL ETHICS 839 (1994).

25. *See* Dubois, *supra* note 1, at 32-33.

26. Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 57-65 (Special Issue, May 1986). One commentator observed: "Today there is an almost endless combination of schemes used to select judges. Almost no two states are alike and few employ the same method for choosing judges at all levels of their judiciary." DUBOIS, *supra* note 20, at 6. For a summary of the selection systems for all states and principal jurisdictions in this country, see THE BOOK OF STATES, *supra* note 6, at 190-92.

27. This system is most commonly referred to as the modified Missouri Plan. *See supra* note 6.

4. executive selection with legislative consent and service until impeachment, retirement, or death.[28]

Because this Article is concerned only with a comparison of the Wyoming merit selection system and the Arkansas election system, the scope of this Article will include only the relative merit of these two systems for the selection of judges.

III. The Wyoming Merit Selection Process[29]

A. Description of the Process

Prior to the 1972 constitutional amendment to its judicial article, all of Wyoming's judges including justices of the peace, district judges (the equivalent of Arkansas's circuit or chancery judges), and supreme court justices were selected by nonpartisan elections. The amendment and related statutes adopted a locally customized version[30] of the modified Missouri Plan for the selection of all judges in the county courts,[31] district courts,[32] and the supreme court.[33] The justices

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28. This briefly describes the method used to select Federal Article III judges. U.S. Const. art. II, § 2; U.S. Const. art. III, § 1. Several states used similar approahes. Maine, Massachusetts, New Jersey, and Rhode Island select at least a portion of their judiciary in this manner. *See* The Book of States, *supra* note 6, at 190-92. This system totally reeks of politics in the selection stage of the process, but after appointment possesses the most protection against political interference and, consequently, is devoid of realistic accountability. Many consider the federal judiciary to be better qualified as a whole than are state judiciaries as a whole. It is not entirely clear that the selection process has much to do with that result. It is important to recognize that federal judges are paid significantly high salaries, have greater resources, possess greater prestige, and have a better retirement plan than state judges do and thus it is arguable that a higher qualified pool of hopefuls seeks these positions. It is extremely doubtful that any state would now adopt a system of this nature considering the electortate's general dissatisfaction with federal judges who are perceived as interfering with state policy and activities.

29. The relevant portions of the Wyoming Constitution dealing with the judicial selection process are reproduced as Appendix A to this Article.

30. Wyo. Const. art. V, § 4; *see infra* Appendix A.

31. By statute, county court judges are selected under the merit selection plan contained in the Wyoming Constitution. The statute provides:

> Judges of the county court shall be nonpartisan, shall be nominated and appointed and retained as provided by article 5, section 4, Wyoming Constitution.

Wyo. Stat. § 5-5-111 (1977). The county courts were created in 1971 as an option to the justice of the peace courts. Counties with populations greater than 30,000 were required to create county courts. For counties with fewer than 30,000 people, the option to create a county court rests in the discretion of the relevant county

of the peace ("J.P.s") remained elected. Because J.P.s do not have to be lawyers, many believed that there was no justification for including them in what is in effect a selecting process applicable to attorneys. In addition, the J.P.s have very limited jurisdiction and are gradually being replaced with county judges who are selected under the merit selection plan.[34]

The merit selection system adopted in Wyoming is a standard commission system. The Judicial Nominating Commission consists of seven members.[35] Three members must be members of the bar engaged in active practice. They are elected by the Wyoming State Bar.[36] Three lay members, who must not be admitted to practice law, are appointed by the Governor. In addition, the chief justice,

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government office. Once created, unity courts supplant justice of the peace courts. A relevant statute provides:

> (a) The board of county commissioners of any county with a population of more than thirty thousand (30,000) inhabitants according to the latest official federal census of the United States shall establish a county court. County courts shall be established on January 1 next succeeding the year in which the census demonstrates a population of more than thirty thousand (30,000) in the county.
>
> (b) The judicial salaries, salaries of the clerical staff, supplies, operating costs, jury and witness expenses and other expenses of the county court shall be paid by the state.

WYO. STAT. § 5-5-102 (1977). Another statute provides:

> (a) In counties in this state which have a population of less than thirty thousand (30,000), according to the latest official federal census, the board of county commissions may establish a county court in their county by the adoption of a resolution establishing the same. Within ten (10) days after the adoption of such a resolution the board of county commissioners shall file certified copies of such resolution with the clerk of the supreme court of Wyoming, with the director of the state department of audit and with the clerk of the district court of the county.
>
> (b) The judicial salaries, salaries of the clerical staff, supplies, operating costs, jury and witness expenses and other expenses of the county court may be paid by the state. The effective date of the state financing of a county court pursuant to this subsection shall be the first day of the next biennial fiscal period unless otherwise authorized by the legislature.

WYO. STAT. § 5-5-103 (1977). A related provision states:

> In any county in which a county court is established, the county court shall supplant and replace the justice of peace courts of the county and shall exercise the jurisdiction previously exercised by the justice of peace courts.

WYO. STAT. § 5-5-105 (1977).

32. WYO. CONST. art. V, § 4(b); *see infra* Appendix A.

33. WYO. CONST. art. V, § 4(b); *see infra* Appendix A.

34. *See supra* note 31.

35. WYO. CONST. art. V, § 4(c); *see infra* Appendix A.

36. The state bar is an integrated bar, which means that all licensed attorneys must be members; consequently, it includes all attorneys in the state.

or the chief justice's designee, is a member and serves as chair of the Commission. All members must be residents of Wyoming, and no more than two members may be residents of the same judicial district during any term of service.[37] Except for the chief justice, all commissioners serve staggered four year[38] terms.[39] After serving a full term a member is not eligible for reelection or reappointment and thus cannot serve consecutive terms in the same position on the Commission.[40] Membership vacancies are filled for unexpired terms in the same manner as original appointments.[41]

The system attempts to diminish a commissioner's potential conflict of interest and sensitivity to the undue influence of certain persons with political power or influence such as the governor. The provisions specifically discourage political favors to and political activity of commissioners. No member of the commission, except of course the ex-officio chief justice, can hold any federal, state, or county public office or any political party office.[42] In addition, no member is eligible for appointment to any judicial office while that person is a member of the Commission and until a period of one year has passed after the expiration of that term for which he or she was elected or appointed. Commissioners serve without compensation for their work, except they may receive per diem expenses incurred for travel and subsistence while attending Commission meetings.[43]

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37. The Wyoming Constitution has a provision dealing with the situation in which the Commission must select a judge for judicial district that is not represented by a commissioner. WYO. CONST. art. V, § 4(c); *see infra* Appendix A. Chief Justice Golden of the Wyoming Supreme Court reports that the representative advisors mandated by the constitution participate in all the processes leading up to the vote. Interview with Michael Golden. Chief Justice of the Wyoming Supreme Court (Nov. 2, 1994). After conveying their opinions concerning the candidates, however, they are excluded from the room while the voting process of the Commission takes place.

38. WYO. STAT. § 5-1-102(a) (1977).

39. WYO. CONST. art. V, § 4(c); *see infra* Appendix A.

40. The one term limit may seem unduly restrictive, but it is designed to reduce the possibility that members who would otherwise serve consecutive multiple terms might be able to exercise dominance over other commissioners or, worse, build a power base from which influences over judgeships could be informally exercised. Although there is arguably a need to have experienced members, the terms are staggered and the Commission has orientation sessions every year to assist new members in understanding their tasks.

41. WYO. CONST. art. V, § 4(d); *see infra* Appendix A.

42. WYO. CONST. art. V, § 4(d); *see infra* Appendix A.

43. The relevant statute provides:

> (b) The members of the judicial nominating commission, including any advisors, shall not receive any fees, salary or other compensation for

Upon the existence of a vacancy[44] in the office of justice or judge in any of the covered courts, the Commission must circulate information concerning the vacancy and the procedure for making application. All members of the Commission review all applications. If a large number of applications are received, the Commission reduces the group to approximately twenty or twenty-five candidates. These candidates are interviewed before the entire Commission for twenty to twenty-five minutes. After each interview the commissioners individually express their opinions and reactions concerning the interviewee. After all of the remaining applicants are interviewed, the members of the Commission determine by voice vote who the three nominees will be; the chief justice votes only in order to break a tie. These nominees' names and files are then forwarded to the Governor for the Governor's selection from the three nominees.

In practice, regardless of the cause of the judicial vacancy, the entire process will be completed within ninety days from the date of the vacancy. The Commission's list of nominees must be presented to the Governor no later than 60 days after the date of vacancy.[45] The Governor has thirty days to select a nominee.[46] The Governor must select from the list, cannot add other names, and cannot ask the Commission to nominate other persons.[47] If the Governor fails or refuses to act, the chief justice selects the judge from the list presented to the Governor.

At the next general election following one full year of service as judge or justice, each newly selected justice or judge who wishes to remain as judge must stand for retention in office on a ballot that submits to the appropriate electorate[48] the question whether the

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services rendered but are entitled to receive per diem and mileage on the same basis and at the same rate as state employees and reimbursement for any other actual and necessary expenses incurred in the performance of commission duties.

WYO. STAT. § 5-1-102(b) (1977); *see* WYO. CONST. art. V, § 4(e); *infra* Appendix A.

44. A vacancy may be caused by death, retirement, tender of resignation, removal, failure of an incumbent to file a declaration of candidacy, or certifications of a negative majority vote on the question of retention in office. WYO. CONST. art. V, § 4(b); *see infra* Appendix A.

45. WYO. CONST. art. V, § 4(b); *see infra* Appendix A.

46. The plan provides that if the Governor fails to select a judge within a period of 30 days from the date of the submission of the list, the appointment must be made by the chief justice from that list within 15 days. To date, however, the Governor has always made the appointment within the allotted time.

47. WYO. CONST. art. V, § 4(b); *see infra* Appendix A.

48. The electorate for supreme court justices is the entire state, the electorate for district judges is the judicial district in which they serve, and the electorate for other covered judges is the geographical area over which their jurisdiction extends. WYO. CONST. art. V, § 4(g); *see infra* Appendix A.

justice or judge will be retained in office for another term or partial term.[49] In addition, this retention ballot procedure must be conducted at the general election held in the last year of each term for each judge.[50] To stand for retention, the judge must file a declaration of candidacy not more than six months nor fewer than three months before the general election.[51] If a justice or judge fails to file the declaration within the time specified, or if a majority of those voting on the question vote negatively to any judicial candidacy, a vacancy is created in that office at the end of the defeated judge's existing term.[52]

B. Interview With Wyoming Chief Justice Michael Golden[53]

Because I have not lived in Wyoming for over fourteen years, I thought it would be useful to discuss with a resident lawyer the recent experience under the merit selection system. Accordingly, I had a two hour telephone conversation with a former student of mine and friend, Michael Golden, who currently serves as Chief Justice of the Wyoming Supreme Court. Justice Golden graduated from law school in 1967, and after a tour of duty in the Army JAG, settled into private practice in Wyoming. He was an outstanding law student, serving as Editor in Chief of the *Land & Water Law Review*, and he built an outstanding reputation as a practitioner. With these impeccable professional and personal credentials, he was selected in 1988 by then Governor Michael Sullivan from a list of three attorneys to serve as a justice of the Wyoming Supreme Court. He has been retained by the electorate in both of his retention elections. He is clearly a representative of how exceptionally well the merit selection system can work. I have the highest regard for his ability and opinion.

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49. WYO. CONST. art. V, § 4(g); *see infra* Appendix A.

50. WYO. CONST. art. V, § 4(g); *see infra* Appendix A.

51. WYO. CONST. art. V, § 4(h); *see infra* Appendix A.

52. WYO. CONST. art. V, § 4(h); *see infra* Appendix A. Some states that use retention elections have increased the percentage necessary for retention to greater than 50%. The Illinois Constitution, for example, requires voter approval by at least 60% of the votes cast. ILL. CONST. art. VI, § 12(d); *see* Lefkovitz v. State Bd. of Elections, 400 F. Supp. 1005, 1006 (N.D. Ill. 1975)k, *aff'd*, 424 U.S. 901 (1976); *Sixty Per Cent Retention Vote Upheld in Illinois*, 59 JUDICATURE 256, 256 (1975).

53. The following discussion concerns remarks made by Chief Justice Michael Golden of the Wyoming Supreme Court, Interview with Michael Golden, Chief Justice of the Wyoming Supreme Court (Nov. 2, 1994).

Much of the two hour conversation concerned the nonretention votes for two judges during the 1992 election.[54] One judge was a justice of the supreme court and the other was a district judge. The reasons for these votes and their consequences are of obvious concern to the judiciary in Wyoming.

As far as reasons were concerned, both judges had more or less organized opposition from different lay groups. In both cases, the lay opposition was concerned about judicial decisions that the respective judges had made. In neither case were there contentions of incompetence, misconduct, or lack of diligence. Clearly, on the surface, these two elections represent the type of interference with judicial processes that many contend or fear adversely affect judicial independence. On the other hand, both cases apparently had a more or less silent undertow of other concerns. In both cases, bar support was partially divided with both judges coming under criticism from some lawyers for problems with certain elements of their styles or performances. Without solid bar support, judges may be more at risk in their retention elections.[55]

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54. In 1992 the two judges who were not retained were Justice Walter C. Urbright, Jr. of the Wyoming Supreme Court and James N. Wolfe, a district judge. Two other judges have also not been retained. In both of those cases, opposition by some members of the bar was insignificant. They were District Judge John P. Ilsley in 1974 and District Judge Paul T. Liamos in 1984. Judge Ilsley was a holdover judge from the election system. His so-called "judicial temperament" had angered numerous lawyers and citizens who had appeared before him in his court. Judge Liamos was another holdover who had received overwhelming support in his first retention election. This election is discussed thoroughly in a law review article on which the following discussion is based. *See* Michael J. Horan & Kenyon N. Griffin, *Ousting the Judge: Campaign Politics in the 1984 Wyoming Judicial Retention Election*, 24 LAND & WATER L. REV. 371 (1989). The problems developed during Judge Liamos's second term. *Id.* at 377. He had adopted court management practices that displeased many lawyers. *Id.* While some believed that Judge Liamos imposed overly harsh sentences, others thought that he was too lenient on criminals. *Id.* at 378. A campaign against him developed, the result of which was a 57% vote against retention. *Id.* In contrast, five other district judges who also ran in their districts during that year receive an average vote of eighty percent in favor of retention. In the Liamos election, voter interest was high and exercised. More people, in the relevant geographical area, voted in this retention election than in the presidential race. *Id.* at 379.

55. It is significant to note that in the 1992 election, three other district judges ran for retention and were successful. Although there were not organized opposition forces against these three candidates, the retention versus nonretention percentages were different for each position. In one county that voted for three of the judges, one supreme court and two district judges, the supreme court justice's vote county equaled 45% for retention and 55% against, while the two district judges received respectively, 59% for retention and 41% against, and 66% for retention and 34% against. Secretary of State, State of Wyoming, Official Vote—General Election,

Chief Justice Golden feels that nonretention elections that seem to focus either in whole or part on judicial decisions and not on conduct are a real threat to independent judicial decision making. As much as one may try to discount the affect of these elections, the fear is that subconsciously one may weigh public opinion in one's decision making. The real problem is not with retention elections, but with any election system that is applicable to judicial selection or retention. Chief Justice Golden feels that because the federal judicial selection model of appointment with no elections is an unrealistic political goal, the retention election system is far superior to the contested election system present in states such as Arkansas.

Despite his concerns about the retention election rejections, Chief Justice Golden firmly believes the merit selection system has worked extremely well. As chief justice, he presides over the Commission, and during his tenure as the presiding officer, he feels the commissioners have been extremely diligent, dedicated, and ethical in their task to select the names that are transmitted to the Governor. He does not believe that back-room politics has played a significant part in the process.

IV. Merit Selection versus Election Selection—Analysis and Comparison

A. General Observations

The merit system in Wyoming has exhibited over the last twenty years all the strengths and weaknesses of a judicial selection system. The system has resulted in the development of a diligent, competent, and professional judiciary. Whether judge by judge it is better than the judiciary that existed under the old election system is not quantifiably determinable. Without question and with only a few exceptions, the amount of money spent on campaigns has nearly disappeared, and clearly the time and effort that judges must spend on campaigning has decreased to near zero. The time delay in replacing judges has also been reduced to a minimum. The selection processes are efficient, fair, and respectable.

On the other hand, four judges have not been retained by the electorate, and at least in some of these elections the judges' decisions

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November 3, 1992 (1993). Approximately the same number of votes were cast in all three elections. It is difficult to understand what these statistical differences mean. It is fair to state that some voters were very discriminate in their voting pattern for these judgeships, whether or not the discrimination was made for the right or wrong reasons.

in individual cases appear to have been significant factors in their defeat. This raises questions concerning the issue of judicial independence. Perhaps politics has even played a part in the selection of some of the judges. But both of these detrimental happenings occur many more times under the election system too, and they are inherent burdens imposed on any system of judge selection or retention and particularly on ones that include a public election process.

B. Contested and Uncontested Elections versus Retention Elections

Before Wyoming adopted the merit selection system, its judges faced many of the same issues with its nonpartisan system as Arkansas now faces with its partisan election system. The principal arguments for an election system are as follows: 1) elections are open, public events; 2) elections incorporate our republican tradition; 3) elections produce a voter-selected representative and accountable judiciary;[56] 4) elections provide a means to educate the public about judicial candidates; and 5) as elected officials, the judges possess greater political stature and credibility. Unfortunately, the election system does not deliver what it promises. Under every circumstance that can arise, the contested election system for judicial selection and retention has disadvantages.

If elections were the result of the considered opinion of the electorate, the election of judges might be a greatly preferred technique. Experience and empirical research unfortunately inform us that this is not the case.[57] The vast majority of voters in judicial elections are not adequately informed about the candidates. Consequently, voters typically make decisions based on very nonprofessional and meritless considerations, including a candidate's campaign promises,[58]

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56. It is arguable whether voters actually are making most of these selections. In many selections by election states, judges are frequently appointed by the appointment authority to fill out a term, then run for reelection and usually win. JEROME R. CORSI, JUDICIAL POLITICS—AN INTRODUCTION 110 (1984); *see* Kurt E. Scheuerman, Comment, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 476 (1993).

57. *See* Dubois, *supra* note 1.

58. The issue of campaign promises in judicial races is one of the most difficult informational problems raised. To take a firm position on a point of public policy similar to candidates for legislative and administrative positions would run afoul of the judicial principles of impartiality, fairness, and open-mindedness. The Judicial Code of Conduct attempts to restrict judicial candidates in this regard. *See infra* note 91.

occupational ballot label,[59] public image, perceptions of the candidate to the electorate,[60] political party,[61] sex or race,[62] the familiarity of the name,[63] or the recommendations of the newspaper or other media.

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59. Dubois, *supra* note 1, at 45. The author states:

> Recent research conducted on nonpartisan judicial elections confirms that where an occupational ballot label is provided voters are most likely to rely heavily upon it in making a voting choice. Incumbents and other individuals holding "judicial" positions are most favored, followed by individuals bearing labels such as deputy district attorney, city attorney, and so forth. Indeed, occupational ballot labels were found generally to be far more influential in affecting voter choice than bar and newspaper endorsements, the voters' pamphlet, the candidates' own publicity efforts as indicated by campaign spending, and other ballot cues to be found in the candidates' names (e.g., sex, ethnicity).

Dubois, *supra* note 1, at 45. (footnotes omitted); *see* Philip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 L. & SOC'Y REV. 395, 404-05 (1984).

Arkansas limits the use of occupational ballot names to the position currently held by the candidate. This means an incumbent judge can run as "judge," but a prior one cannot. Arkansas law provides:

> (c) Any person who shall file for any elective office in this state may use not more than three (3) given names, one of which may be a nickname or any other word used for the purpose of identifying such persons to the voters and may add as a prefix to his name the title or an abbreviation of an elective public office the person holds. The name of every candidate shall be printed on the ballot in the same form as the candidate signed the political practice pledge. No candidate shall be permitted to change the form in which his name will be printed on the ballot after the deadline for filing the political practice pledge.

ARK. CODE ANN. § 7-7-305(c) (Michie 1993). This section was amended in 1991. The amendment substituted "the title or an abbreviation of an elective public office the person holds" for "an abbreviation of any professional title which he has a legal right to use." *Compare* ARK. CODE ANN. § 7-7-305(c) (Michie 1993) *with* ARK. CODE ANN. § 7-7-305(c) (Michie 1987) (amended 1991).

60. *See infra* note 82 and accompanying text.

61. A New York study indicated that 39%, the single highest identified factor, of the electorate voted for judges on the basis of party affiliation. This is relevant in a two party state, but lacks importance where the only contested election is in the party primary. There are those who argue that this voter preference may be a rational method of making a choice if political and philosophical differences exist between the party candidates. Dubois, *supra* note 1, at 42.

62. The Voting Rights Act may require this as more "safe" districts for minority candidates are created. *See* Thomas P. Prehoditch, *The Voting Rights Act and Judicial Selection Litigation: An Evaluation of Remedial Options*, 11 REV. LITIG. 523 (1992).

63. *See* Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529 (1991). The author observed:

> [I]n popular urban areas, judicial elections may reflect popularity and name recognition more than competency. For example, in Dade County, Florida, MacKenzie, a female judicial candidate possessing no courtroom experience, ran against Dellapa, an acclaimed judge. One month before

Recommendations of the media, if based on substantive criteria, *may* be the best reference point mentioned, but this is clearly not the preferred basis of a judicial selection decision. In fact, these recommendations may themselves be based on one or more of the other nonprofessional bases.

At the extremes, judicial election system either intrude on impartiality and judicial independence or are void of electorate accountability. If a judgeship is contested, there is a real possibility that candidates will partake in legal issue and policy debates[64] or will attack particular decisions of incumbents or courts. This type of campaigning offends general judicial concerns for impartiality, objectivity, and fairness, but is a natural result of contested elections.

At the other extreme, uncontested elections, though safe from the evils of contested campaigns, suffer from irrelevance and are void of republican concepts of accountability. Under election selection systems, once an office is filled by election, there are seldom any opponents for the judge in subsequent elections.[65] Consequently, the so called "election" is illusory: it is no election at all. One might view this as recognition of the judge's good work, but it is usually representative of the problem that lawyers have in seeking election against an incumbent judge. The lack of an opponent is seldom a result of superior performance by the incumbent, but is more likely a result of the inherent barriers judicial candidates face against incumbent judges and the potential disadvantage the loser may feel

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> the election, a Mimai Herald article related MacKenzie's lack of experience and her recent bout with alcoholism. MacKenzie won by a comfortable 25,000 votes. An "all-American" name and subsequent newspaper exposure may aid a candidate, despite the article's content.

Id. at 556-57 (footnotes omitted).

64. This may become a greater problem if more courts hold that the judicial ethics restrictions on campaigning are unconstitutional. *See infra* notes 92-99 and accompanying text.

65. *See* James D. Gingerich & Warren Readnour, *The 1990 Arkansas Judicial Elections: Much Ado About Nothing?*, ARK. LAW, July 1992, at 37, 38 (noting that incumbents ran unopposed in 70% of the judicial races in 1990 and in 88% of the races between 1976-88). In the 1994 general election, a pitiful 6% of the races were contested. There were only 4 contested judicial elections out of 69 races. Secretary of State, 1994 Election Candidates Filed with Secretary of State (Sept. 24, 1994). One supreme court justice and two court of appeals judges ran without opposition in both the primary and the general election. If there is no decision for the electorate to make, why have elections? Although retention elections may produce the same results, all voters who decide to vote in judicial races actually have a choice—retain or don't retain.

in representing clients before the victorious incumbent.[66] Most lawyers who would be eligible or would want a position practice before the incumbent judge. To be that judge's judicial opponent can cause grave concerns, real or perceived, on the part of a losing lawyer and his or her clients. Again, the system is perceptually corrupted by the election process.

The fact that few will run against incumbent judges also rebuts one of the primary justifications for a contestable election system to select judges. It is difficult to defend the election process on the basis that the electorate should have the opportunity to make the decision about whom its judges should be when there is no decision to be made. Uncontested elections are hardly elections.

Even if the extreme circumstances are not applicable and one is analyzing a contested race that avoids impartiality and judicial independence issues, the process still fails to attain its goals. The campaigns will be devoid of debate over the highly relevant policy and decision issues. Thus the election usually will be determined by nonqualification criteria such as cleverness of the ad campaigns or the electorate's perceptions of the respective candidates.[67] Add to this the general disinterest the electorate has in judicial election and you have a process that is not worth the effort and costs.

The merit selection system cuts through these problems. First, there are no contested elections to stimulate the type of controversy that undermines impartiality and judicial independence. Second, there still is public accountability because the electorate has an opportunity to vote for or against a judge in every retention election: there are no unopposed candidates. In contrast to unopposed elections, the merit selection system makes a consequential election automatic and meaningful. Although the electorate is not faced with a choice of candidates, it is faced with a decision of whether the sitting judge has adequately performed her or his judicial position. This is very relevant to the electorate and, when a judge's performance is in dispute, is taken seriously by the electorate.[68]

Another problem that is inherent in any judicial election system is the occurrence of frivolous contests. Sometimes certain attorneys, for a wide range of reasons, will run against well regarded incumbent

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66. *See* Robert F. Utter, *Selection and Retention—A Judge's Perspective*, 48 WASH. L. REV. 839, 843 (1973).

67. For a discussion of some of the campaign techniques in issueless judicial elections, see Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 99-100 (Special Issue, May 1986).

68. *See supra* note 54.

judges merely for the purpose of public exposure and to improve notoriety. These occurrences have two harmful effects. First, the incumbent cannot assume victory and must expend time, money, and energy to defend reelection.[69] Second, sometimes the challenger wins regardless of merit.[70]

These results cannot occur under the merit selection system. One would not submit an application and thus seek a nomination from the selection commission without an intent and desire for the position. Moreover, even if a well-qualified incumbent is not retained, however unfortunate this is, the replacement will be chosen by the selection commission on the basis of merit and desire.

The problems of an under-informed electorate need to be resolved with education programs sponsored by the bar and hopefully supported by the media. In addition, there is no denying that special interest groups can organize and campaign against certain judges on particular legal issues or decisions. These campaigns can make it difficult on a judge in a particular retention election. Bar support for the judge is essential. If this support is divided or weak, the judge may be in trouble. This risk is an inherent part of any election system whether it involves contested races or merely retention elections.[71]

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69. The incumbent fears that the electorate will not properly discriminate between candidates on the basis of experience, competence, and ability. A true story will illustrate this point. During the time when Wyoming elected its judges, a friend of mine was discussing the upcoming elections with an acquaintance. The issue of judicial races arose, and my friend asked the acquaintance for whom she was going to vote in a race for the supreme court. For that office there were two candidates, one incumbent and one person who ran for supreme court every time there was a vacancy. The aspiring justice's name was John J. Spriggs and he was a malcontent who many thought was unqualified to be a justice of the supreme court. The acquaintance responded, "Oh, I am voting for Mr. Spriggs." The friend, astonished, blurted out, "Why?" The acquaintance explained, "Well, Mr. Spriggs has to run every two years, and the others only have to run every six. I feel sorry for him and so I am going to vote for him." For more stories concerning Mr. Spriggs, see Michael Golden, *Journey for the Pole: The Life and Times of Fred H. Blum, Justice of the Wyoming Supreme Court*, 28 LAND & WATER L. REV.—PT. 2 511, 550-60 (1993).

70. A very similar scenario actually occurred in Wyoming prior to the adoption of the merit selection system. A well regarded but aging justice of the supreme court was defeated by a relatively unknown attorney who many understood was running primarily to gain exposure for his practice. There were indications that he was never comfortable in his new position. Later, after the organization of the merit selection system, he submitted his name for consideration for a district judgeship. A district judgeship was one for which he had an interest and in which he would be comfortable. The Governor appointed him to the district court upon the understanding that he resign from the supreme court; he did so and stayed in the judiciary.

71. *See infra* text accompanying note 103.

C. Judges, Money, and Campaigning

A major problem of the election selection system is the election process itself. Campaigns take time, money, and personnel.[72] The monetary costs of the election systems are too high, unnecessary, ethically corruptible, and impose serious adverse harm on the entire judicial system. The monetary costs to the candidate in an election system are purely economic dead weight. Other than the financial support provided to printers, the postal services, the advertising media, and campaign workers, if any are paid, the pay back to the judicial system for the expenditures is nonexistent or even results in a negative balance. Whereas contributions to the campaign of legislative and executive candidates may result in the contributor gaining a supporter in the particular office if that candidate wins, support for a winning judicial candidate must ethically be ignored by the judge or a serious conflict of interest may arise either in particular litigation or by a desired rule of law or procedure.

Significant percentages of campaign funding come from lawyers and potential litigants.[73] Judges know who their supporters are notwithstanding attempts to separate the judge from some of these activities. If a judicial candidate must obtain campaign funding and assistance, and if this money and support must come from potential litigants or lawyers who will practice before the judge's court, the perception of favoritism is undeniable and unavoidable. Instantly, suspicions of conflict of interest and influence issues are raised if contributors have cases before the judge for whom they made a campaign contribution.[74] Suspicions of favoritism are magnified if

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72. Compared to other political races, judicial elections are usually underfunded, understaffed, and poorly organized. *See* Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 110 (1985).

73. Stuart Banner, Note, *Disqualifying Elected Judges From Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 470-74 (1988); Schotland, *supra* note 72, at 110-20.

74. Contributions to judicial campaigns have been cause for motions for recusal of a judge. Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 87-88 (Special Issue, May 1986). The author stated:

> In some highly publicized cases, the receipt of large contributions has led lawyers to try to disqualify judges from sitting in cases in which contributors are involved. Attorneys for Texaco, for example, argued that the first district judge assigned to the multi-billion dollar suit between Texaco and Pennzoil should be disqualified from hearing the case because he received a $10,000 contribution from one of Pennzoil's lawyers. Another example of an effort to disqualify judges involved a case in which attorneys argued before the Supreme Court that three justices should be disqualified because

the contributor wins. It makes no difference whether the possibly wrongful conduct is ever litigated or matures into a full fledged controversy. Many lawyers and litigants perceive favoritism as a problem whether it actually exists or not.[75] For those working in the system and their clients, the system is corrupt. This belief desecrates the foundational mainstays of the judicial system: fairness and impartiality. The perception of corruption of the judiciary by the election process is the election system's most serious fault. This alone justifies the removal or alteration of this method of judicial selection. But there are other problems as well.

Many, including myself, believe that there is no adequately safeguardable campaign funding system feasible as an alternative to financial support of judicial candidates by lawyers or other private citizens. The suggestion of public financing, although attractive to some, carries with it costs that few, if any, states will support.[76] In addition, it only resolves the financial conflict of interest issue between the elected judge and outside contributors. It does not resolve the other serious problems raised by the election system in regard to funding of campaigns.

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they had received large contributions from the opposing party in the case, Clinton Manges.

Id. (footnotes omitted).

After a thorough study of a Texas campaign, another commentator concluded:

> The strongest conclusion that can be drawn from this research and from the controversy in Texas over judicial selection is that partisan elections, coupled with the extant system of campaign financing, create at least the appearance of impropriety and probably the occasional reality. The patterns we have shown—of lawyers on opposite sides of the docket contributing to their respective judicial champions—has nothing to recommend it, at least if we take seriously the ideal of judicial impartiality.

Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184, 189 (1991).

One commentator urged that upon the motion of a noncontributing party, a judge should be automatically disqualified if the nonmoving party contributed to the judge in the case in excess of a specified amount, such as $1,000. Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 489 (1988).

75. As Washington Supreme Court Justice Robert Utter commented, "The mere appearance of a judge's ability to reward his supporters . . . and discriminate against those who did not support him creates a situation which can only reduce public confidence in the judiciary." Robert F. Utter, *Selection and Retention—A Judge's Perspective*, 48 WASH. L. REV. 839, 843 (1973).

76. Several states provide partial funding for judicial elections. Schotland, *supra* note 72, at 60. Professor Schotland offers other suggestions for the financing problem, none of which will solve the problem if a robust contested election is involved. Schotland, *supra* note 72, at 123-32.

Assuming no outside funds from private persons or entities is sought or needed, the funding of campaigns still raises serious issues. For example, even if the judge were required to finance her or his own campaign personally, ethical and sociological problems would still exist. First, if the campaign costs are high, the candidate's investment may jeopardize the candidate's financial well-being, thereby increasing opportunities and motivations to misuse the judicial power for purposes of personal gain.[77] Less dramatic but not necessarily less harmful, any resultant financial crisis caused by the campaign costs may subject the judge to credit problems or require the judge to have to work through bankruptcy type circumstances. The efforts to resolve these problems may divert the judge's full-time attention from the judicial position and thus diminish the judge's effectiveness as judicial officer. Considering the generally low salary structure for judges when compared to other legal salaries, this tale of financial problems for the winning judge is not a fantasy.[78] It may be one of those situations where the loser wins because the loser may have better opportunities to resolve any financial crisis caused by the election campaign. It is doubtful that many qualified persons, other than wealthy attorneys, would seek or contest judicial positions under such a limited election funding system, but it would be one of the few ways an election system could avoid the conflict of interest perception problems caused by outside fund raising.

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77. The Operation Greylord investigation and prosecution of Chicago judges and others for bribery is a warning that this type of justice may occur. By September 1, 1988, after over ten years of investigation and prosecution, eleven judges were convicted of various crimes. SPECIAL COMMISSION ON THE ADMINISTRATION OF JUSTICE IN COOK COUNTY, FINAL REPORT 13-14, 55-56 (Sept. 1988). The Special Commission on the Administration of Justice in Cook County, established in August 1984, was assigned the job of studying all facets of the Cook County courts and issuing a written report that would recommend improvements in the court system. The final report discussed the issues raised by Operation Greylord and possible remedies to the problems uncovered by this investigation. Among its recommendations, the Commission advocated a merit selection system for judges. *Id.* at 88; *see* Lynn Weisberg, *Operation Greylord*, 73 JUDICATURE 223 (1990) (reviewing BROCTON LOCKWOOD & HARLAN M. MENDENHALL, OPERATION GREYLORD: BROCTON LOCKWOOD'S STORY (1989); JAMES TUSHY & ROLO WARDEN, GREYLORD: JUSTICE, CHICAGO STYLE (1989); SPECIAL COMMISSION ON THE ADMINISTRATION OF JUSTICE IN COOK COUNTY, FINAL REPORT (Sept. 1988)).

78. Consider that in Arkansas in 1990 candidates for contested judicial offices spent, on average, $30,950 apiece. James D. Gingerich & Warren Readnour. *The 1990 Arkansas Judicial Elections: Much Ado About Nothing?*, ARK. LAW, July 1992, at 37, 40. If the candidate had to fund this entirely from personal resources, it is clear that full funding by the candidate would be an enormous burden.

Two informative articles concerning the Arkansas judicial selection system deserve mention.[79] These pieces provide a wealth of useful information about the election processes. The statistical information contained in these articles is worthy of analysis for the purposes of this discussion. This analysis draws me to some different conclusions than those indicated by the authors.[80] In fact, I believe the data in these articles substantiate the problems of the current system and present a strong argument for changing the system to a merit selection plan.

Some of the financial statistics presented concerning the 1990 judicial elections deserve comment. First, three million dollars was raised for all judicial campaigns during that election year. In effect, had these elections been conducted pursuant to a merit selection plan similar to the one in Wyoming, this would have resulted in a net savings of three million dollars. These are funds that could have

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79. *Id.* at 37; James D. Gingerich, *Campaign Finance in Judicial Elections*, ARK. LAW., Apr. 1989, at 45.

80. The authors analyzed a large number financial statistics concerning judicial elections between 1976-90. *See* authorities cited *supra* note 79. Their conclusions were that judicial elections are not substantially funded by attorney contributions, and that the average costs of judicial campaigns in Arkansas have not "skyrocketed." I am concerned that the authors might have potentially failed to see the forest for the trees. First, the problems of campaign fund raising do not relate solely to attorney contributions, but also to the source of all contributions including those of potential litigants. How many people involved in banking, insurance, or real estate, for example, contributed to the campaigns? The articles do not suggest the answer to this question.

Second, the only identified contributors to the campaigns, as a group, were attorneys who gave $250 or more. Anyone, including many lawyers, who gave less than that amount fell into a category simply labelled the "unitemized" funding source category. According to the statistics given, unitemized contributions constituted a significant percentage of the funds raised. Consequently, the real impact of bar and litigant contributions cannot be ascertained from the public records. Despite the supposed wall built by the Code of Judicial Conduct, Canon 7(B)(2), between the candidate and contributors, there is no proof or promise that judicial candidates are unaware of the names of the donors of these funds. It has been observed that it is unrealistic to believe a judicial candidate does not know who contributed either time or money to the campaign. *See* Stuart Banner, Note, *Disqualifying Elected Judges From Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 470-74 (1988). In addition, if an election is contested knowledge of who gave to the losing opponent may be as much of an ethical concern.

Third, the average amounts raised and expended do not tell the real costs when races are aggressively contested. Using 1990 statistics, one supreme court candidate spent $390,000 and his opponent $240,000, for a total of $630,000. Rare as this situation may be, if the election system continues it will be repeated at some time in the future. Other examples of trial court elections costing candidates more than $100,000 confirm the possibility for high cost campaigns in Arkansas. These type of expenditures for judicial races are not beneficial to the judicial system, let alone the particular candidates. The only way to realistically stop them is to abandon the election appointment system and to adopt a merit selection plan.

gone to other political candidates or for other preferred purposes. No retained judge in Wyoming has owed on any loans for his campaign. The judge's salary goes to the judge, not to the bank to repay campaign loans. During service as judge over the term following an election, no Wyoming judge has had to worry about the ethics of sitting on a case where a contributor or noncontributor to her or his campaign is counsel. No counsel or client perceives the judge as proverbially "in the other side's pocket." No campaign promises or threats were made to retain or obtain office. Rather, the decisional process is clear and unencumbered. What an improvement! How refreshingly clean and ethical! What more do you need from these statistics to overwhelmingly explain why the merit selection plan is the preferred approach?

As mentioned, major election campaigns not only take a significant amount of money, but also the incumbent's time.[81] For those judges with crowded dockets or caseloads, the time lost may seriously harm the system or other judges who have to pick up the slack. Consequently, the incumbent must either neglect the judicial work (that is, postpone it) or the campaign. To the credit of most judges, it is the latter that suffers most.

D. Back-room Politics Versus Election Politics

The merit selection system has frequently been criticized for substituting secret "back-room" politics for the open politics of public elections. One has to accept that no matter what system of selection is used some form of "politics" will play a part.

Public election campaigns run from the ridiculously inane, where no relevant issues are discussed, to the prejudicially sublime, where positions on legal issues are thoroughly exposed. Clearly, when they approach the latter extreme, the political shenanigans of public campaigns are not the form of "politics" that has any redeeming virtue for the judiciary or the judicial system. When they fall in the former group, they offer nothing to the system because the electorate is kept in the dark. Although qualifications can be emphasized, too often the campaign turns into a public relations display of qualification irrelevancies. Matters such as incumbency, judging or trial experience, years of practice, and membership in organizations are touted without qualitative analysis. Worst yet, campaign gimmicks, including clever and often professional musical or visual images, are broadcast to persuade the electorate. Nothing

81. *See* Robert F. Utter, *Selection and Retention—A Judge's Perspective*, 48 WASH. L. REV. 839, 845 (1983).

concerning qualifications is generally necessary or even considered. Of course, this approach is no different than that used by candidates for other elected offices and is nothing more than "playing the game of politics." The problem with this approach for judicial elections is that "politics as usual" is the evil.[82] The judicial system does not need the political idol: it needs judges who are competent, impartial, intelligent, etc.[83] That a contested election system ever produces well-qualified judges, and amazingly it does, is sometimes purely a matter of chance.[84]

"Politics" in the merit selection system has two radically different meanings. First, politics can refer to the process of gathering information about applicants for the judicial position. This is beneficial political activity because it directly relates to the determination of merit. We want the merit selection commission to obtain information concerning the candidate and her or his performance.[85] Certainly, the commission should undertake an ethics check with the state and national ethics entities to see if the candidate has any significant violation on record. Expressions of support and opposition from other attornies, clients, and other citizens should be encouraged. The more the commission members know about the applicants the more likely they will make better decisions on who is to be included on the recommendation list. This is good politics.

Another form of politics relevant to the merit selection process is the individual commissioners' viewpoints as to what qualifications are best for members of the judiciary. This was mentioned earlier and is inherent whenever criteria are undefined.

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82. In Fairness, qualitative analysis of these issues in a campaign setting is probably unrealistic considering the nature of most campaign advertising.

83. For a discussion of the ideal qualifications for a judge, see *infra* note 122 and accompanying text.

84. In addition, many times the judge is initially appointed by the appointing authority in the state, and merit may be relevant in that selection process. *See supra* note 56.

85. Politics can never be removed entirely from the process. A commentator reports that one Arizona commissioner believes behind-the-scene campaigning is a necessary evil because it gives the commission "insight into the breadth of a candidate's appeal in the community and a candidate's abilities." John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 891 (1990).

One experimental method used in Arizona to make the process more open is to hold the candidate interviews as public events and to allow them to be televised. *Id.* at 890. Judge Roll warns, however, "Whether these procedures result in the dissemination of worthwhile information or constitute a return to the elusive search for political charisma remains to be seen." *Id.* Most states with merit selection do not hold public interviews. *See* MARLA N. GREENSTEIN, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS 16-20 (1984).

The "bad" type of politics, which receives far greater attention than it deserves, is the politics of influence. Some have occasionally raised charges that persons such as governors have exercised their political power to influence the selection processes. Clearly a governor who selects members of the commission can have some influence on the process.[86]

Notwithstanding these observations, the role of politics under the merit selection system pales in significance when compared to its status under election systems.[87] The Wyoming experience would indicate that the problem is more imaginary than real.[88]

Responses from commissioners indicate that generally they believe the list of candidates sent to the governor are the result of the careful study of information concerning those candidates' abilities. More importantly, the commissioners generally feel that they have voted for the person they felt was best for the position.[89] The overwhelming opinion of commissioners is that the work they do is extremely significant, is taken seriously, and results in an improved judiciary.[90] That is as much as any selection system can expect.

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86. *See* Richard A. Watson, *Observations on the Missouri Nonpartisan Court Plan*, 40 Sw. L.J. 1, 4 (Special Issue, May 1986). Commonly the nonlawyers are appointed by the governor. If their terms were staggered, it would probably take a multiterm governor to affect all lay members. The attorney members of the commission are usually elected in some manner by members of the bar. The judicial member of the commission may or may not be influenced by the governor. In fact, this member may have personal influence. Consequently, governors would seldom control a majority of the commission. *Id.* at 4-5.

87. Roll, *supra* note 85, at 865.

88. Golden, *supra* note 53. Chief Justice Golden expressed the belief that the processes would be improved and secured from misuse if the commissioners could receive greater training on their responsibilities and how they should handle the pressures from outside persons. Golden, *supra* note 53. The American Judicature Society offers a wide range of materials and assistance on such training. *See, e.g.*, GREENSTEIN, *supra* note 85.

89. MISSOURI BAR ASS'N SPECIAL COMM. TO REVIEW AND EVALUATE THE MISSOURI NONPARTISAN COURT PLAN, REPORT TO THE BOARD OF GOVERNORS OF THE MISSOURI BAR 9 (Jan. 15, 1986).

90. Beth M. Henschen et al., *Judicial Nominating Commissioners: A National Profile*, 73 JUDICATURE 328 (1990). The authors concluded:

> Of course, many of the criticisms that the commissioners leveled at merit selection, as well as their suggestions for improving the process, are not new; rather, they are reflective of concerns that have been expressed since the adoption of the Missouri Plan 50 years ago. It is also important to note, however, that only one-third of our respondents had negative comments to make or offered proposals for change. Of those suggestions that were made, the overwhelming majority fell into the "technical, fine-tuning" category. Over one-half of the commissioners had no complaints with how the process works in their states, while the remaining 15 per cent praised

E. Campaigning on Issues

The contentious nature of elections can undermine the public policy goal that judges act impartially and without political influence. The ethical rules for judges prohibit judicial candidates, to one degree or another, from making campaign promises.[91] On the one hand, we are faced with the dilemma of an innocuous, monotonous campaign for judicial office under Model Code of Judicial Conduct Canon 5(A)(3)(d).[92] On the other hand, pledges can threaten perceptions of judicial impartiality and thereby reduce public

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their commission's performance. One non-lawyer wrote that she serves on as "effective and efficient commission. The members take their responsibility very seriously and deliberations are both thoughtful and thorough." Another layperson called merit selection a "near-perfect system" and found being a commissioner a "very satisfying and fulfilling experience." Attorney members also expressed satisfaction with the operation of their commissions and many viewed it as an important component of professional responsibility. "It's the greatest single thing an attorney can do to contribute to the quality of the legal system," one respondent wrote. The significance of participating in the selection of state judges was summarized by a fellow attorney: "I can think of few more delicate and far-reaching tasks in the profession of law."

Id. at 334.

91. For example, Canon 5(A)(3)(d) of the Arkansas Code of Judicial Conduct states:

> (3) A candidate for a judicial office:
> (d) shall not:
> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
> (ii) announce views on disputed legal or political issues; or
> (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent . . . .

ARK. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d) (1993). The commentary to Canon 5(A)(3)(d) stated:

> Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the Arkansas Rules of Professional Conduct.

Id. (commentary).

92. *See supra* note 91.

confidence in the judicial system.[93] The prejudicial result of issue oriented campaigns and the possibility of necessary recusal demands by litigants due to preordained opinions expressed during the campaign cannot be overstated. One cannot obey Canon 5(A)(3)(d) and still participate in a lively issue-oriented, contested campaign.[94] Either the judicial candidate will advocate selected causes that he or she will pursue, or no issues of merit will be raised, leaving the electorate in an intellectual vacuum.[95] Thus, the election process risks infringement on the judicial ethical standards that bar judges from taking public positions on legal matters.

Recently District Judge George Howard of the United States District Court for the Eastern District of Arkansas held Canon 5(A)(3)(d) unconstitutional.[96] Complaints about two judges' behavior in separate campaigns were filed with the Arkansas Judicial Discipline and Disability Commission (AJDDC). The AJDDC is responsible for the enforcement of the Arkansas Code of Judicial Conduct. The alleged violations concerned two candidates for different circuit court positions who had campaigned on the premise that they would not allow or would restrict plea bargaining in their courts if elected.

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93. Professor Snyder summarized the problem as follows:

> Justification for the Judicial Code's restrictions on campaign rhetoric by candidates in judicial elections rests on two grounds. First, campaign pledges and policy pronouncements arguably interfere with the judge's impartiality. The judge allegedly is less able to render a fair and unbiased decision on an issue that comes before him if he has committed himself to a course of conduct or policy on that issue as a candidate for office.
>
> Second, the restrictions allegedly preserve public confidence in the judiciary. If judicial candidates were free to make campaign pledges or discuss disputed issues, the argument goes, the public would view the candidates as politicians with personal agendas rather than impartial arbiters who follow the dictates of the law. Consequently, citizens would lose faith in the ability of judges to decide dispassionately and fairly the issues that come before them.

Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 214 (1987).

94. Rules limiting judicial campaign speech distort that debate. By limiting the capacity of campaigners for judicial office to provide voters with useful, relevant information about their reasons for seeking office, campaign restrictions inhibit election campaigning and give added credence to the argument that judges should be appointed.

95. Kurt E. Scheuerman, Comment, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 479 (1993). The author stated, "If judges are left to discuss only their identity, qualifications, and present position, the voters will have little information upon which to make a choice." *Id.*

96. Beshear v. Butt, 863 F. Supp. 913 (E.D. Ark. 19940. Apparently the AJDDC will not appeal this decision.

Judge Howard's full statement concerning First Amendment rights versus the judicial ethics rule is worthy of quotation:

> This Court is persuaded that 7(B)(1)(c) and 5(A)(3)(d), which contain virtually the same language, in precluding a judicial candidate from expressing "his views on disputed legal or political issues" are substantially overbroad and vague. These provisions prevent a significant amount of constitutionally protected conduct by inhibiting free expressions as well as imposing a chilling effect on a judicial candidate's efforts and desire to express his views to the public relative to problems confronting the judiciary and how the candidate proposes to deal with them. Indeed, 7(B)(1)(c) and 5(A)(3)(d) minimize the importance of free speech and openness in the very branch of the government that serves as guardian of the civil liberties of the people. These provisions impose a direct and substantial limitation on expressions that are secured under the First Amendment. In other words, these canons are too inclusive. On the other hand, they are vague. Defendants themselves refer to caselaw, which will occur on a case to case basis, as a way to define the involved language. Truly, a judicial candidate striving diligently to conduct a campaign that is consistent with the canons, without the benefit of any specific standards as a guide, would in all likelihood refrain from expressing his views, while permissible under the First Amendment, in order to avoid the risk of a probable cause hearing likely to result in a public reprimand as happened to Donovan.[97]

This decision has significant ramifications for judicial elections in the future.[98] Judicial candidates are not going to be ethically

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97. *Id.* at 917-18. The court cited Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224 (7th Cir. 1993). In that case, Judge Posner wrote the opinion that invalidated the rule as unconstitutional and rejected the lower court's attempt to rewrite or narrow the same provision. *Id.* at 230-31.

98. Not all courts see the constitutional issue the same way. The Kentucky Supreme Court held its similar rule to be constitutional and distinguished the *Buckley* case. Deters v. Judicial Retirement & Removal Comm'n, 873 S.W.2d 200 (Ky. 1994). There seems to be some debate over the particular words of the ethics rule. The Arkansas Rule states that a judicial candidate shall not "announce views on disputed legal or political issues." ARK. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1993). Before invalidated in *Buckley*, the Illinois rule was the same. *Buckley*, 997 F.2d at 225. The Kentucky Rule, however, is slightly different and states that a judicial candidate shall not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court. . . ." KY. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1977). Do the words "likely to come before the court" make a difference? Is there a difference between prejudging a case or controversy before the court and making public statements concerning one's political philosophy concerning judicial

restricted from speaking out on relevant legal and political issues. The ethical lid is off, and some candidates will find it irresistible to express their free speech on a wide range of judicial issues. This will be particularly applicable in contested elections where campaign advantage is a requirement. Judicial candidates may find it advantageous to express opinions concerning judicial issues that seem to be popular with the electorate. A topic that will probably receive greater attention in contested judicial campaigns, considering the current mood of the general electorate, is how the candidate as judge will deal with "criminals."

This ruling is fuel for the fire of change in our current judicial selection system. If one feels outspoken judicial candidates are intolerable, a rape of the judicial system, and something that must be prevented, that person should support a change from the election selection system for judges to a merit selection system.[99] Although retention elections can raise these types of issues,[100] there will be far fewer occasions when this will occur, and if it does, the bar and others interested in judicial independence can take a united stand against the debate. When, however, elections are contested, there is generally no way for the bar to take a stance because of personal divisions concerning candidate support. In addition, issue controversies are more likely to be found in contested elections than in retention elections because contested elections involve candidates who have organizations that seek funds for the campaigns.

F. Accountability and Retention

A foundational concept of our judicial system is that our judges must be independent in their judgment, that they should not make

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review or issues of public interest? These questions and others will have to be resolved before the full impact of these decisions on judicial elections can be determined. Notwithstanding the validity of variations of the rule, the current Arkansas Rule is inapplicable as far as campaigns for judgeships are concerned.

99. *See* Snyder, *supra* note 93, at 263.

100. There are several notorious exceptions to this observation. The California election of 1986, where three supreme court justices were defeated in retention elections, is the most serious example of the opposite occurrence. *See* Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988). The 1992 election in Wyoming when two judges were not retained is another example. *See supra* note 54. The point is that so long as elections are a part of the total selection system for judges, the elections may be contentious, but this contentiousness is going to occur less often in retention elections than in contested elections.

decisions on the basis of political influence or popularity.[101] Consequently, removal techniques should protect the judges' independence from public sway in the individual case, but allow for removal due to unfitness, misconduct, and even unpopular opinions.[102] An impeachment standard of high crimes and misdemeanors is generally too high a standard for state judges. If a state retains a retention process either through contestable elections or through retention elections, it must be assumed that the judges do not necessarily have lifetime positions and are accountable to the electorate for their conduct and even sometimes for their opinions. Results may occur under either approach that some may feel infringe on the judges' judicial independence.

Judicial independence, however, is only one of the attributes of a well functioning judicial system. A system that is counter-majoritarian should not be totally separate from the will of the people. Having a method by which the public may participate is another equally important attribute, especially to engender public confidence in the system. Drawing the political line between judicial independence and public accountability is the difficult task for a judicial selection system.

It has been argued persuasively that accountability is an equal consideration with independence, especially when judges deal with policy and discretionary legal issues. One commentator summarized this position as follows:

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101. The reasons offered for the need for judicial independence can be summarized as follows:

> A. The judiciary serves a critical antimajoritarian role requiring protection from temporary public majorities and shifting popular opinion.
>
> B. As a separate branch of the government with its poer of judicial review of the acts of the other branches of the government, including legislatures or executives, the judiciary must be protected from the influence or control of those branches of the government.
>
> C. The public credibility of the judiciary depends on the perception of impartiality, and thus judges must be free from the private influence of others.

See DUBOIS, supra note 20, at 20-28.

102. As stated in a recent article on judicial selection, "Judges should be free to decide cases based upon the Constitution, the applicable laws, reason, and precedent, not popular will." Lawrence R Yetka & Christopher H. Yetka, *Selection and Retention of Judges in Minnesota*, 15 HAMLINE J. PUB. L. & POL'Y 169, 170 (1994); *see also* Chisom v. Roemer, 111 S. Ct. 2354, 2366 (1991). In *Chisom*, the Court noted, "The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously *requiring* them to run for elected offics." *Chisom*, 111 S. Ct. at 2366-67 (emphasis added) (citation and footnotes omitted).

> Constitutional decision-making involving alleged deprivations of important fundamental rights and liberties is only a small portion of what state courts are asked to do. State judiciaries are far more occupied "with common law development, statutory application and interpretation, procedural review, and the supervision of lower courts." It is this difference in judicial function which suggests a different balance to be struck between accountability and independence. . . . In most of their work, courts should be supportive of majoritarian values and concerns.[103]

The recent story of the three California Supreme Court judges who were not retained under that state's retention election system is a tale of success for the system.[104] The public spoke and the judiciary had to listen. Independence without responsibility for actions and philosophy is totally counter to any democratic principle. This election did not overturn any cases. It sent a message that judges cannot be philosophically arrogant with no concern for the beliefs of the public at large. Some have said this raped the judicial system, but I believe it was refreshing that the public could become interested and involved in the judicial selection process. The same result will most likely not occur again soon. Judicial accountability is desired by the public and is a reasonable burden on the judiciary as a whole. All retention systems carry with them this judicial interference potential.

Commentators at both ends of the debate sometimes criticize the merit selection system. I have heard judges complain about the retention election aspect of the system because they believe that judges are put at risk and the electorate may throw them out for improper reasons or even no cause at all. When the retention system produces a negative do-not-retain vote the cry is "foul." Many consider it unfair and an attack on the independence of the judiciary. On the other hand, I have heard other opponents argue that the retention system basically guarantees reelection as no one ever loses. When the system retains a large percentage of the judges who seek retention, it is called ineffective, nonresponsive, and predetermined. I think both opinions, being on the extreme, are correct in regard to result but wrong in regard to the merit of these results. These opposing results clearly reveal the balance which the merit system is trying to produce: job security and judicial independence under

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103. Dubois, *supra* note 1, at 39 (footnotes omitted).
104. *See* Thompson, *supra* note 100.

normal circumstances, but accountability and rejection when the electorate believe it deserved. This is not a fault of the system—but a strength. It removes the greatest evil of election systems contested, costly campaigns—but retains a degree of electorate input and involvement which, I believe, with the right bar and media encouragement, can be converted into public confidence in the judicial system.

Whenever the election system is used, it requires public participation to work properly. The extremes of participation are the problem. Apathy and high priced, vindictive media campaigns are undesirable. The goal must lie somewhere in the middle. The electorate should vote with knowledge of the relevant issues, including the candidate's or incumbent's competence, past conduct, personal character, and judicial philosophy.

One of the paradoxical problems with every judicial election system is that the more interest the public shows in a judicial election, the more ethical and institutional harm that may be done. Hotly contested judicial elections that draw public interest often either concern candidates who as part of campaign strategy express their positions on legal issues, a clear conflict between the candidates' First Amendment rights and the judicial code of ethics,[105] or concern a new candidate who attacks an incumbent on the results, and not the legal merits, of the incumbent's previous judicial decisions. Neither situation really benefits the judicial system. If election accountability is a part of the selection or retention system, one or more of these situations will occur at some time or other. Although attacking an incumbent's decisions may occur in retention elections under a merit selection plan, the primary system for these consequences remains the full contested election system. It is the advocacy for the position that makes these elections so threatening to the judicial system and to judicial independence.

Clearly, the sitting judge has the advantage in a retention election process. If there is no controversy, the electorate will vote "yes." Moreover, those who are concerned about the quality of the judiciary must undertake efforts to inform the electorate as to the decision to be made. Much of this falls on the shoulders of the bar, and the bar should and normally will assume responsibility.[106]

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105. *See supra* notes 96-97 and accompanying text.

106. Judges in Arkansas were for several years evaluated by lawyers answering a questionnaire prepared by the Arkansas Bar Association. This practice ended several years ago, apparently because of the complaints of judges. Interview with William A. Martin, Executive Director, Arkansas State Bar Association (Dec. 1, 1994).

G. Judicial Evaluation and Discipline

Judge evaluation systems have been instituted in many states. Generally, they involve some type of a poll which is sent to members of the bar and others who have direct contact with the members of the judiciary. The questionnaires usually request those polled to rate each judge on a sliding scale of five or more evaluative levels, ranging from best to unsatisfactory. The subjects concern many of the factors that relate to the attributes of a good judge, including character, integrity, impartiality, courtesy, prejudice, diligence, intelligence, temperament, legal knowledge, punctuality, promptness, decisiveness, and fortitude. The questionnaires emphasize that only those who had contact with a specific judge should provide responses for that judge.

The results of these polls are tabulated and disseminated via the appropriate media. If done properly, these results can be helpful to the electorate either in contested elections or in retention elections. Unfortunately, under the contested election system of selecting judges, performance evaluations only have a consequence if the elections are contested. In addition, the opponent is usually not evaluated, and thus any evaluation is potentially unfair to the incumbent. Under a merit selection system, performance evaluation efforts are always relevant and can be effective.[107]

Greater efforts in this regard need to be taken. The surveys need to be fine tuned to ensure that they are both fair to the judge and are obtaining the most relevant responses from the persons polled. Finally, additional study and effort must be undertaken to improve the methods of the dissemination of the collective evaluations to the electorate so that the process will have the intended results.[108]

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107. Another anecdotal story is worthy of mention There was a district judge in Wyoming who was known for his less than gentle treatment of lawyers, clients, and jurors in his courtroom. It was the general consensus that he was outrageous and should be censured for some conduct with which he had been charged. He had become judge under the election system and had never faced an opponent in great part due to the fear he had put into members of the bar. Although grandfathered in under the merit selection plan, he, like all other judges in the system, had to run in a retention election in the last year of his term. With certain examples of outrageous conduct freshly in mind, the bar and several citizen groups publicized the word to the electorate that this person should not be a judge. The election proved that the campaign was successful, and the judge was not retained. Some fear that this type of campaign may occur where a judge makes an unpopular decision.

108. No dissemination system works correctly in every situation. The dynamics of the electortate and its collective reaction to individual circumstances are sometimes disconcerting to lawyers who sincerely desire and strive to improve the judiciary

The direct cooperation and guidance of the media needs to be obtained.

Using judicial discipline processes is another course of action. Forty-eight of the fifty states now have established some form of judicial discipline system.[109] In Arkansas, the Arkansas Judicial Discipline and Disability Commission was established in 1989. Unfortunately, it is not designed or intended to deal with the typical complaints concerning judges.[110] The purpose of the Commission is to deal with major acts of judicial misconduct, incompetence, and wrongdoing. The potential actions by the Commission include reprimand or censure, suspension with or without pay, or removal.[111] The grounds set out in the Arkansas Constitution justifying sanctions include violations of the professional and ethical standards governing judicial officers, conviction of a felony, or physical or mental disability that prevents the proper performance of judicial duties.[112] Statutory grounds for suspension and removal include any conviction of a felony or other crime that reflects adversely on the judge's honesty, trustworthiness, or fitness as a judge in other respects; conduct that involves dishonesty, fraud, deceit, or misrepresentation, or which is prejudicial to the administration of justice; any willful judicial or professional ethics violation; willful and persistent failure to perform the duties of office; or habitual intemperance in the use of alcohol or other drugs.[113]

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and the judicial system. One tale of woe illustrating this matter occurred in Alaska, a state which not only has a merit selection system but also an elaborate judge evaluation system. In a retention election of four judges where one was declared under the evaluation system to be unqualified, the electorate approved the "unqualified" judge by a greater margin than the ones who received positive evaluation. Here the bar had taken an active stance against a judge and was rebuked by the electorate. A complete analysis of this situation is discussed in William Jenkins, Jr., *Retention Elections: Who Wins When No One Loses?*, 61 JUDICATURE 79, 82-83 (1977).

109. THE BOOK OF STATES, *supra* note 6, at 193-99. New Hampshire and Vermont appear to be the two exceptions. THE BOOK OF STATES, *supra* note 6, at 193-99.

110. The constitutional grounds are as follows:

> Grounds for sanctions imposed by the Commission or recommendations made by the Commission shall be violations of the professional and ethical standards governing judicial officers, conviction of a felony, or physical or mental disability that prevents the proper performance of judicial duties. Grounds for suspension, leave, or removal from office shall be determined by legislative enactment.

ARK. CONST. amend. LXVI. For the statutory definitions, see *infra* note 113.

111. ARK. CONST. amend. LXVI.

112. ARK. CONST. amend. LXVI.

113. ARK. CODE ANN. § 16-10-410(b) (Michie Supp 1994). The statute states:

> (b) a Judge may be removed from office on any of the following grounds:

As indicated, the difficulty with these procedures is that they anticipate grievous conduct that goes to the heart of whether the person is qualified to continue to serve as judge. Many difficulties that judges encounter involve matters that do not reach the scope of being ethical or legal violations, neglect, or failure of duty. These problems deal directly with a judge's working relationships with attorneys who practice before the judge or with persons who have judicial contact with the judge, including jurors, parties, and witnesses. These matters may be petty on a scale of seriousness, but are very important to the persons affected. These types of issues such as the setting of court dates, the timeliness of decisions, and the treatment of attorneys, litigants, witnesses, and jurors can give a judge a bad reputation and can affect the result of elections including retention elections. It is unfortunate that no process can effectively deal with such complaints.[114] Judges resist these procedures for a variety of reasons, including a fear that they may have to defend themselves continually against petty complaints. The lack of such a system, however, creates tensions that can mature into rejection at the ballot box.[115]

H. Diversity Considerations

The selection consideration of diversity is a difficult issue to satisfactorily resolve. First, as previously mentioned, the merit selection system is generally more flexible in regard to the types of persons who seek positions.[116] Thus, diversity is satisfied to this extent. If diversity means greater opportunity for women and minority lawyers,

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(1) Conviction of any offense punishable as a felony under the laws of Arkansas or the United States;

(2) Conviction of a criminal act that reflects adversely on the judge's honesty, trustworthiness, or fitness as a judge in other respects;

(3) The commission of conduct involving dishonesty, fraud, deceit, or misrepresentation;

(4) The commission of conduct that is prejudicial to the administration of justice;

(5) Willful violation of the Code of Judicial Conduct or Professional Responsibility;

(6) Willful and persistent failure to perform the duties of office;

(7) Habitual intemperance in the use of alcohol or other drugs.

Id.

114. *See* Kenyon N Griffin & Michael J. Horan, *Judicial Merit Retention in Wyoming: An Analysis and Some Suggestions for Reform*, 15 LAND & WATER L. REV. 567, 588-91 (1980).

115. *See* Michael J. Horan & Kenyon N. Griffin, *Ousting the Judge: Campaign Politics in the 1984 Wyoming Judicial Retention Elections*, 24 LAND & WATER L. REV. 371, 398 (1989).

116. *See supra* notes 19-22 and accompanying text.

the past records of all selection systems have been less that exemplary.[117] Age may be a factor in this matter. Most judges are elected or selected when they are in their late 40s and 50s.[118] Because the number of female and minority attorneys has increased rapidly in the last fifteen years, many potential candidates from these groups are just now reaching this age and experience level. Considering also that a properly functioning merit selection system should select women and minorities in greater numbers than will general election systems,[119] one inevitably concludes that the diversity of the judiciary is better placed under the control of a merit selection commission than under an election process. Speculative as it may be, I believe that Arkansas would have more quickly had a full-term minority member of the supreme court or the court of appeals under the merit selection process. Most of the women judges we currently have were originally appointed, and we would have had more if a merit selection system had been in place over the last ten years.

V. Selection Criteria

The debate over which system is better than another system revolves around the issue of who is best qualified to be a judge. In addition to selection methods that affect judicial criteria, observers disagree on what experience and training are best for members of the judiciary. Many lawyers think that only attorneys who have significant trial experience should be judges. Others feel that the judiciary should represent a broader spectrum of skills and experiences, including nonlitigation practitioners, academics, and government or corporate attorneys.

The intensity of this debate may depend in large part on the type of judge whose selection is to be made. A trial judge may require trial practice experience in order to make trial decisions concerning evidence and other trial process issues. On the other hand, appellate judges make few of these types of decisions and may better possess reflective, intellectually oriented experiences and skills. Unfortunately, desirable skills are seldom discussed and almost never qualitatively evaluated.

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117. Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 105-06 (Special Issue, May 1986).

118. *See, e.g.*, James D. Gingerich & Warren Readnour, *The 1990 Arkansas Judicial Elections: Much Ado About Nothing?*, Ark. Law., July 1992, at 37, 38; James D. Gingerich, *Campaign Finance in Judicial Elections*, Ark. Law., Apr. 1989, at 66, 69.

119. Norman Krivosha, *Acquitting Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 Sw. L.J. 15, 19 (Special Issue, May 1986).

My personal position on this is one of total flexibility. The legal profession is a large, diverse profession with room enough to accommodate a wide range of experiences and backgrounds. It is my feeling that the judiciary should have representatives from all aspects of legal experience, including trial lawyers, litigation lawyers, corporate lawyers, corporate attorneys, and academics. These are all part of the same profession. They exhibit the same training. Although their experiences may be different, their intellectual and judicial foundation and spirit come from the same sources. All of them are in the business of representing persons or causes, developing logical and substantively sustainable positions, and nurturing an underlying sense of fairness and justice which the system requires.

Comparing the selection systems from the standpoint of desirable skills and experiences is revealing. When judicial selection is to be made by a commission, the professional resume of service and performance assumes greater importance. If judicial selection is by ballot in a contested election, the candidate's political skills and connections are paramount.

Who makes the best judge? From the litigant's personal standpoint, the answer is simple—the one who rules in my favor! Although not an acceptable answer, this philosophy is relevant to what selection technique is used to choose our judges. Everyone wants a judge who one believes will treat her or him fairly and sympathetically in result and be simpatico of mind. Unfortunately, this is not really the proper test. Some have expressed the thought that defining the perfect judge is impossible and that any list of virtues is elusive and obscure.[120]

Despite these admonitions, let me suggest a guide to necessary qualities. Society needs judges who are intelligent, honest, diligent,

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120. Maurice Rosenberg, *The Qualities of Justice—Are They Strainable?*, 44 TEX. L. REV. 1063 (1966). Professor Rosenberg so eloquently posed the problem:

> An inqury such as this probes so deeply into imponderables that it may be rash to enter upon it even with the greatest difidence. Obviously, the custodians of every sector of human activity are eager to compile a list of qualities that "best equip" a man to perform the chosen work with excellence, but everywhere the composition of the list is notoriously elusive. It is particularly obscure when the qualities sought are personal, subjective, and human—those that are important in measuring a lawyer for a judgeship. Yet as hard as the task may be, there is a special urgency for finding the human qualitis in a judge that are most promising and the flaws that are most damaging. More than the teacher, the engineer, or the lawyer, the judge acts directly upon the property, liberty, even life, of his fellows.

Id. at 1064.

self-disciplined, decisive, reflective, courteous, organized, courageous, and learned in the law.[121] Judges should also possess an inherent sense of good ethical behavior, high personal integrity, justice, compassion for people, personal humility, and fidelity to their oaths of office and legal institutions.[122] There are undesirable qualities, too. Society cannot tolerate judges who are mean spirited, dishonest, or mentally incompetent. Because no one will perfectly satisfy the ideal, we must strive for reasonable acceptability. In addition, we must not give too much definiteness to each characteristic because judges should be a diverse group, representative of a wide range of experiences,[123] personalities, and heritages. A dedicated consciousness in the selection process of the goal of increasing representation of the number of judges of different races and sexes is essential.[124]

One relevant observation concerning the suggested characteristics for judges is that they do not include any of the characteristics often found in successful political candidates—charisma, party affiliation, campaign organization, fund raising ability, and public notoriety. If the elected judge possesses any of the desired characteristics, and most of our elected judges do possess them, it is not necessarily attributable to the election process, but to the general quality of the candidate pool of lawyers. Most would concede that a few of our elected judges do not qualify under the above recommended personal qualities.

VI. Arkansas Proposals for Judicial Selection Reform

A. Nonpartisan Elections

An Arkansas Bar proposal for the 1995 legislative session was to adopt a nonpartisan election system for all judicial elections. This proposal represented a political compromise. It was based on the

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121. For an interesting and insightful piece in which four authorities on the judiciary discuss what they each believe are desirable traits in appellate judges, see Ruggero J. Aldisert et al., *What Makes a Good Appellate Judge? Four Views*, 22 Judges' J., Spring 1983, at 14 (Pieces by Judges Ruggero J. Aldisert, William H. Erickson, and Samuel J. Roberts, and Professor Robert A. Leflar). *See* Rosenberg, *supra* note 120; Sheldon Goldman, *Judicial Selection and the Qualities that Make a "Good" Judge*, Annals, July 1982, at 112.

122. This list of ideal desirable characteristics might be considerd a direct roadmap to sainthood. Jokingly, it might not hurt if the person could walk on water or be in two or more places at th same time Actually, judes must avoid a divinity complex. *See* Aldisert et al., *supra* note 121.

123. Including cultural, professional, and educational differences.

124. See *supra* text accompanying notes 116-119, for a discussion of this diversity issue.

proverbial thought that half-a-loaf is better than no loaf at all. At this point, it may still be the only reform legislatively feasible. Unfortunately, it might be worse than no reform if better reform could come at a later time.[125]

From an analytical standpoint of desirable features for a judicial selection system, a nonpartisan election system may be the worst of all selection methods.[126] First, it does nothing to remove the corruptive aspects of a contested election system. Judges must still obtain campaign funds, must still spend inordinate time campaigning, and campaigns can still create judicial ethics problems over campaign issues. In addition, it has been said that nonpartisan elections are often so in name only, that parties still support certain candidates over others on a formal endorsement or informal endorsement basis.[127] True nonpartisan elections may exacerbate the campaign financing problems of the candidates because contributions may be more difficult to obtain and campaign costs higher because of the greater difficulty candidates will have in getting their messages across.[128] Some contend that the electorate is actually more uninformed about candidates in nonpartisan judicial elections than those in partisan elections.[129] At least in partisan elections the electorate has some reference points, such as party identification and its normal philosophical meanings.[130] In addition, nonpartisan elections draw lower voter interest and participation,[131] and voter decisions are made on the basis of incumbency or ballot labels, such as judge or district attorney.

These results are hardly an endorsement of the nonpartisan election system. It seems to me that Arkansas would be better off

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125. David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 21 (1992); DUBOIS, *supra* note 20, at 7-8.

126. It is conceded that many states use this system for one or more of their courts. *See* THE BOOK OF STATES, *supra* note 6, at 190-92.

127. Anthony Champagne, *The Selection an Retention of Judges in Texas*, 40 SW. L.J. 53, 63 (Special Issue, May 1986); *see also* Davi Adamany & Philip Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 756-60.

128. Champagne, *supra* note 127, at 63.

129. Dubois, *supra* note 1, at 44-45.

130. Dubois, *supra* note 1, at 44-45.

131. Kurt E. Scheuerman, Comment, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 477 (1993). The author determined: "Thus, nearly one-third of voters in nonpartisan elections do not cast votes in the judicial races." *Id.; see* DUBOIS, *supra* note 20, at 48.

retaining its current system than to go to nonpartisan elections. It is not the type of reform that is needed, and I fear that if adopted, the legislature will think it has properly reformed the system.

B. New Judicial Article

The better course of action is to continue to promote the new Judicial Article proposed in 1990.[132] This new Judicial Article proposal would establish a merit selection system similar to the Wyoming system discussed previously.[133] It proposes the creation of a Judicial Nominating Commission composed of nine members[134]—four lawyers,[135] four lay persons,[136] and a judge.[137] This commission would be charged with the task of recommending, within thirty days[138]

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132. *Draft: Proposed Judicial Article*, NEWS BULL., Sept.-Oct. 1990, at 2. Relevant portions of this draft are reproduced in Appendix B.

133. *Id.* §§ 17-18, at 3.

134. Except, of course, for the ex officio judge, members would only be permitted to serve two terms. *Id.* § 17(F). The fourt year terms are staggered. *Id.*

135. One lawyer from each congressional district would be elected by a majority vote of the licensed attorneys actually voting and residing in the district. *Id.* § 17(C).

136. One lay member from each congressional district would be selected by a majority vote of the Governor, Lieutenant Governor, and Attorney General. *Id.* § 17(C).

137. Members of the Supreme Court would select from among themselves the judge who would act as hair of the commission. *Id.*

138. *Id.* § 17(A). Most of the states that have merit selection systems have adopted a thirty day rule and apparently are able to properly function. *See* MARLA N. GREENSTEIN, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS 16-20 (1984). This short time period of commission action makes the replacement procedure extremely swift and efficient. From a practical standpoint, however, it may not provide enough time to adequately complete all the tasks that must be completed, including the dissemination of information concerning the vacancy, gathering and reviewing applications, conducting necessary background investigations on applicants, and interviewing the candidates. The short time period has two real problems. First, it forecloses full recruitment activities which are useful in achieving diversity on the courts, and second, it forecloses adequate review and investigation of applicants' professional and personal backgrounds. It would not be unrealistic to speculate that thirty or more attorneys might file for a supreme court posistion. How can a commission adequately review these applications? Thirty days sets an impossible timetable and should be changed to sixty days. *See* WYO. CONST. art. V, § 4(b).

Another rationale for the short time table woud be to effective limit the opportunities available to political activists who could put undue presure on commissioners. One the other hand, the short period might benefit persons who have inside notice of an impending resignation or retirement by a current judge. Notwithstanding these counterpoints, I worry that the commission will not have the time to obtain the information necessary to fully grasp the applicants' qualifications or disqualifications and thus will not be able to cognitivey and thoroughly reflect on the comparative merits of the applicants.

from the date of the vacancy, three qualified candidates for final selection by the Governor.[139] If the Governor failed to select from the list within thirty days from the date of submission of the list, the chief justice would make the selection.[140] If the vacancy was in the position of chief justice, upon the failure of the Governor to act, the Lieutenant Governor would select the new judge.[141] This merit selection technique would be applicable to all appellate judges.[142] It would retain nonpartisan elections for trial judges.[143] Midterm vacancies for trial judges, however, would be selected via the merit selection method, with selected judges being able to succeed themselves.[144] This approach would go a long way to provide the type of reform necessary to get the Arkansas judiciary out of the corruptive influences of the election system.

Unfortunately, even this proposal is too controversial. The proposal was passed by the senate in revised form,[145] but did not succeed in the house. Opponents abound and range from several judges and ex-judges who sincerely believe in the election system, to some legislators[146] and some members of the media who believe

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139. *Draft: Proposed Judicial Article*, NEWS BULL., Sept-Oct. 1990, § 17(A), at 3.

140. *Id.*

141. *Id.*

142. Including the supreme court and the court of appeals. *Id.* § 17.

143. Trial judges include judges of a revised circuit court and a new district court. *Id.* § 18. Frankly, this is not beneficial. Campaign costs, candidates' future promises of judicial results, and attacks on the incumbent's decision occur more frequently at the trial level than they do at the appellate level. Trial level judges should be selected by the merit system as well.

144. The net effect of this convoluted approach to merit selection is that the merit selection system would initially select a large number of trial judges. Because the proposal would eliminate the limitation on the ability of appointed judges to succeed themselves, these judges would run as incumbents and their chances of reelection would be great. Consequently, the merit selection system would effectively control who would initially become trial judges in many situations. But the merit selected appointed judge would possibly face direct opposition in the next election for the position.

145. Obviously, the change from an election system to a merit system was too controversial to include in the proposed constitutional amendment itself. The senate version of the amendment would have retained the election system, but also would have allowed the legislature to submit a merit selection system to the electorate at a later time.

146. Although seldom expressed, there is an undercurrent of interbranch jealousy between the legislature and the judiciary. A few legislators privately express the opinion that judges ar arrogant, unruly, and unresponsive bullies who need to be cut down a notch or two. Requiring judicial elections is a subtle way to make this cut. Therefore, an "if I have to run, so should you" attitude prevails. Add to this the interbranch jealousy of the executive branch. A legislator may not want

the merit selection system is a conspiracy of the legal profession against the public.

One of the most preplexing factors in the Arkansas situation is the opposition to the merit system by the Democratic Party. This opposition arises primarily because the merit system will reduce the number of candidates for office and because the primary system in Arkansas has traditionally been financed by the parties collecting candidate filing fees.[147] Under this system, the loss of filing fees from judicial candidates would cause the costs of primary elections to be borne by other candidates for office.[148] The evil here is that the state has not funded the primary elections directly. A change in how Arkansas funds primaries may now be on the near horizon. On March 2, 1995, the United States Court of Appeals for the Eighth Circuit held the current system unconstitutional.[149] Although a change in how primary elections are funded may not change party attitudes about judicial elections, it may remove an irrelevant political barrier to the establishment of merit selection for the judiciary.

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an appointment system for judges because it increases the Governor's powers The consequence of these factors is that it is difficult to convince legislators of the merit of merit selection.

147. The relevant statute provides:

> Subject to the provisions of this act and other applicable laws of this state, organized political parties shall:
>
> (1) Have the right to prescribe the qualifications of their own membership;
>
> (2) Prescribe the qualifiations for voting in their party primaries;
>
> (3) Establish rules and procedures for their own organization;
>
> (4) Pay the expenses of their own primary election. However, any part of the expenses of a primary election may be paid by a county whenever an appropriation therefor is made by the quorum court of the county.

ARK. CODE ANN. § 7-3-101 (Michie 1987).

148. The Judicial Reform Bill that was considered during the 1995 legislative session reveals the importance of this issue. To appease party officials, the Bar included a provision that continues filing fees for nonpartisan judicial elections and distributes those fees to the parties for the cost of primary elections *See* Editorial, *Judicial Reform? Not if It's Left up to the Ledge*, ARKANSAS DEMOCRAT-GAZETTE, Oct. 12, 1994, at 6B.

149. Republican Party v. Faulkner County, No. 94-1684, 1995 WL 85383 (8th Cir. Mar. 2, 1995). The court stated:

> We find that the state of Arkansas has failed to come forward with a compelling state interest necessitating the heavy burdens placed upon the First and Fourteenth Amendment rights of voters and political parties by the dual requirements that parties both conduct and fund primary elections as a condition of ballot access. Consequently, the combined effect of Ark. Code Ann. §§ 7-7-102(a) and 7-3-101(4) renders those provisions unconstitutional as they operate in conjunction with one another. Cognizant of our role as a federal court, we do not purport to advise Arkansas on the best means of rendering constitutional its election code: that decision rests with the sound judgment of the Arkansas legislature.

Id. at *12.

VII. Reaching for Judicial Selection Reform

Clearly, Arkansas will not easily achieve judicial reform that includes the merit selection of judges. As indicated, there are outspoken and financially interested opponents. What can be done to overcome this resistance?

Those who are interested and dedicated to merit selection of judges need to develop a plan. Merit selection did not come to Wyoming without a fight. The proponents organized.[150] The Judicial Selection and Tenure Committee of the Wyoming State Bar actively promoted the changes. They held well publicized "Citizens' Conferences" where the issues concerning judicial selection were discussed by local and national authorities before widely represented audiences. Proponents encouraged newspapers throughout the state to promote the conferences. At one of these conferences, organizers formed a geographically and professionally diverse steering committee to directly promote merit selection in the state. Moreover, organizers obtained funds from the state bar, a state planning committee, the judicial conference, and members of the state bar. It seems to me that if substantial reform is to come to pass, an organized effort of this nature will be required.

VIII. Conclusion

In evaluating the merits and defects of the two judicial selection systems under discussion in relation to the general aims of a judicial selection method, the merit selection system is the best. First, in regard to the desire to assure judicial independence, merit selection surpasses any contested election system. Although retention elections are not free from problems in this regard, contested election systems threaten far greater harm to judicial independence. Second, through the selection commission's processes of recruitment, interviews, and deliberation, the merit selection system is designed to recruit a high quality judiciary. Contested election systems may by chance accomplish this as well, but the potential for less qualified judges is greater. Third, merit selection is superior to contested election systems in providing for accountability in a greater number of judicial positions because retention elections apply to all judges. The common "uncontested" election does not exist. Fourth, the merit selection system opens up the process to a wider range of lawyers from a wider

150. *See Proceedings of the Wyoming State Bar Convention 1972*, 8 Land & Water L. Rev. 359, 386 (1973) (containing the report of the Judicial Selection and Tenure Committee).

variety of backgrounds. There are no barriers to candidacy such as the contested election system creates. Consequently, merit selection has a greater opportunity than contested election systems do of expanding the pool of lawyers who will seek judicial positions and thereby results in creating a more representative judiciary. Finally, by stabilizing the selection processes, by selecting a better qualified and more diversified judiciary, by allowing the electorate through retention elections to make a decision on all judges, and by eliminating the perceptions of conflicts of interests, merit selection systems clearly sustain and justify public confidence in the fairness and integrity of the judicial system. The experience of states such as Wyoming that have merit selection obviates these facts.

I end where I began. There is a great deal of disagreement about merit selection and its value. My personal observations of the system in Wyoming convinced me that it was a wise decision for that state to change from a nonpartisan election system to a merit selection system. My research into the issue for this Article corroborates these observations and thus reconfirms my opinion. Arkansas, today, is similar to the Wyoming of the 1970's. Arkansas needs a merit selection system for its judges. I intend to be a strong advocate for this change. It is hoped that this *Symposium on Arkansas Law: The Arkansas Courts*, for which this article was written, can act as a catalyst for action on this important subject.

APPENDIX A

[T]he Wyoming merit selection plan is incorporated into subpart (b)-(h) of section 4, Article V of the Wyoming Constitution. Subpart (a) concerns the number of supreme court justices, what constitutes a quorum, selection of a chief justice, and temporary replacement of a justice. The Wyoming Statutes include sections expanding the scope of the constitution's application to county courts and defining the terms of the commissioners.]

WYOMING CONSTITUTION, ARTICLE V, SECTION 4.*

§ 4 Supreme court generally; number; election of chief justice; quorum; vacancies in supreme court or district court; judicial nominating commission; terms; standing for retention in office.

(a) The supreme court of the state shall consist of not less than three nor more than five justices as may be determined by the legislature. The justices of the court shall elect one of their number to serve as chief justice for such term and with such authority as shall be prescribed by law. A majority of the justices shall constitute a quorum, and a concurrence of a majority of such quorum shall be sufficient to decide any matter. If a justice of the supreme court for any reason shall not participate in hearing any matter, the chief justice may designate one of the district judges to act for such nonparticipating justice.

(b) A vacancy in the office of justice of the supreme court or judge of any district court or of such other courts that may be made subject to this provision by law, shall be filled by a qualified person appointed by the governor from a list of three nominees that shall be submitted by the judicial nominating commission. The commission shall submit such a list not later than 60 days after the death, retirement, tender of resignation, removal, failure of an incumbent to file a declaration of candidacy or certification of a negative majority vote on the question of retention in office under section [subsection] (g) hereof. If the governor shall fail to make any such appointment within 30 days from the day the list is submitted to him, such appointment shall be made by the chief justice from the list within 15 days.

(c) There shall be a judicial nominating commission for the supreme court, district courts and any other courts to which these provisions may be extended by law. The commission shall consist

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of seven members, one of whom shall be the chief justice, or a justice of the supreme court designated by the chief justice to act for him, who shall be chairman thereof. In addition to the chief justice, or his designee, three resident members of the bar engaged in active practice shall be elected by the Wyoming state bar and three electors of the state not admitted to practice law shall be appointed by the governor to serve on said commission for such staggered terms as shall be prescribed by law. No more than two members of said commission who are residents of the same judicial district may qualify to serve any term or part of a term on the commission. In the case of courts having less than statewide authority, each judicial district not otherwise represented by a member on the commission, and each county, should the provisions hereof be extended by law to courts of lesser jurisdiction than district courts, shall be represented by two nonvoting advisors to the commission when an appointment to a court in such unrepresented district, or county, is pending; both of such advisors shall be residents of the district, or county, and one shall be a member of the bar appointed by the governing body of the Wyoming state bar and one shall be a nonattorney advisor appointed by the governor.

(d) No member of the commission excepting the chairman shall hold any federal, state or county public office or any political party office, and after serving a full term he shall not be eligible for reelection or reappointment to succeed himself on the commission. No member of the judicial nominating commission shall be eligible for appointment to any judicial office while he is a member of the commission nor for a period of one year after the expiration of his term for which he was elected or appointed. Vacancies in the office of commissioner shall be filled for the unexpired terms in the same manner as the original appointments. Additional qualifications of members of the commission may be prescribed by law.

(e) The chairman of the commission shall cast votes only in the event of ties. The commission shall operate under rules adopted by the supreme court. Members of the commission shall be entitled to no compensation other than expenses incurred for travel and subsistence while attending meetings of the commission.

(f) The terms of supreme court justices shall be eight years and the terms of district court judges shall be six years.

(g) Each justice or judge selected under these provisions shall serve for one year after his appointment and until the first Monday in January following the next general election after the expiration of such year. He shall, at such general election, stand for retention in office on a ballot which shall submit to the appropriate electorate

the question whether such justice or judge shall be retained in office for another term or part of a term, and upon filing a declaration of candidacy in the form and at the times prescribed by law, he shall, at the general election next held before the expiration of each term, stand for retention on such ballots. The electorate of the whole state shall vote on the question of retention or rejection of justices of the supreme court, and any other statewide court; the electorate of the several judicial districts shall vote on the question of retention or rejection of judges of their respective districts, and the electorate of such other subdivisions of the state as shall be prescribed by law shall vote on the question of retention or rejection of any other judges to which these provisions may be extended.

(h) A justice or judge selected hereunder, or one that is in office upon the effective date of this amendment, who shall desire to retain his judicial office a succeeding term, following the expiration of his existing term of office, shall file with the appropriate office not more than 6 months nor less than 3 months before the general election to be held before the expiration of his existing term of office a declaration of intent to stand for election for a succeeding term. When such a declaration of intent is filed, the appropriate electorate shall vote upon a nonpartisan judicial ballot on the question of retention in or rejection from office of such justice or judge, and if a majority of those voting on the question vote affirmatively, the justice or judge shall be elected to serve the succeeding term prescribed by law. If a justice or judge fails to file such a declaration within the time specified, or if a majority of those voting on the question vote negatively to any judicial candidacy, a vacancy will thereby be created in that office at the end of its existing term.

APPENDIX B

PORTIONS OF THE ARKANSAS BAR ASSOCIATION DRAFT JUDICIAL ARTICLE FOR THE ARKANSAS CONSTITUTION

SECTION 17. SELECTION OF APPELLATE JUSTICES AND JUDGES.

(A) VACANCIES.

Vacancies in the office of Justice of the Supreme Court or Judge of the Court of Appeals shall be filled by appointment by the Governor from three qualified candidates whose names are submitted to him by the Judicial Nominating Commission, established and organized as provided in this Article. The names of these nominees shall be submitted to the Governor by the Commission within thirty (30) days from the date the vacancy occurs. If the Governor fails to make the selection within thirty (30) days from the date the names are submitted to him, the Chief Justice of the Supreme Court shall make the selection from the nominees. If the vacancy is in the office of Chief Justice, and the Governor fails to act within the specified period, then the Lieutenant Governor shall make the selection from the nominee.

(B) TERMS OF JUDGES—RETENTION IN OFFICE—ELECTION.

Each Justice or Judge selected pursuant to these provisions shall hold office for an initial term ending December 31, following the next general election after the expiration of twenty-four (24) months in office. Not less than sixty (60) days before the general election next preceding the expiration of the term of any Justice or Judge selected under this section or retained in office pursuant to Section 19(A)(1), any such justice or judge may file a declaration of candidacy for election to succeed himself with the office of the Secretary of State. If a declaration is not so filed, the position shall be filled by selection as is provided for in this Article. If such a declaration is filed, his name alone shall be submitted at the next general election to the voters, without regard to party affiliation as follows:

"Shall [Justice] [Judge]

_____

of the _____ Court be

retained in office?

Yes_____ No_____ (Mark One).

If a majority of the votes cast on the question are against retaining the Justice or Judge in office a vacancy shall exist upon the expiration of his term of office, which vacancy shall be filled by selection as provided for in this Article; otherwise, the Justice or Judge shall, unless removed pursuant to this Constitution, remain in office for the number of years after December 31 following such election as is provided for the full term of such office, and at the expiration of each term shall be eligible until he has reached the age of seventy (70) years for retention in office by election in the manner prescribed in this Article.

(C) COMPOSITION OF JUDICIAL NOMINATING COMMISSION.

The Judicial Nominating Commission shall consist of a member of the Supreme Court to be selected by said Court, who shall serve as chairman, one attorney from each congressional district, as they are composed on January 1, 1990, and one lay member from each such congressional district.

The attorney members shall be selected by majority vote of the licensed attorneys actually voting and residing within the congressional district from which the attorney is selected. This election shall be conducted by the Clerk of the Supreme Court, pursuant to rules promulgated by the Supreme Court.

The lay members of the Commission shall be selected by majority vote of the Governor, Lieutenant Governor and Attorney General.

(D) QUALIFICATIONS OF COMMISSIONERS—RESTRICTIONS.

Each member of the Judicial Nominating Commission shall be a qualified elector, and shall hold office until his successor is selected and certified. The attorney members and lay members of the Judicial Nominating Commission shall be ineligible to serve if they hold any elective or appointive office of any executive, judicial, or legislative branch of the federal government, the state, or municipality, a county, or if they hold any office in a political party.

(E) CERTIFICATION AND ORGANIZATION OF COMMISSIONERS.

The Clerk of the Supreme Court shall immediately after the election of the Supreme Court member and the attorney members of the Judicial Nominating Commission, certify to the Secretary of State, the names of the Supreme Court member and the attorney members. The Governor shall immediately certify to the Secretary of State the names of all lay members appointed. The Secretary of State shall then notify each of the certified persons of his membership on the Commission. Successors to these members shall be certified and notified in the same manner. The Commission shall then promptly meet and organize. A majority of members of the Judicial Nominating Commission shall constitute a quorum for the transaction of business and any act of the Judicial Nominating Commission shall require the affirmative vote of a majority of the total membership of that Commission.

(F) TENURE OF COMMISSIONERS.

The members of the Judicial Nominating Commission shall serve staggered terms of four (4) years, provided that four of the initial members shall serve two (2) years, and five members shall serve four (4) years; and the successors of each shall serve four (4) years. These staggered terms shall be decided by the drawing of lots. No members shall serve for longer than two terms. At the end of the term of any member the office shall become vacant.

(G) VACANCIES ON THE JUDICIAL NOMINATING COMMISSION.

Vacancies occurring on the Judicial Nominating Commission shall be filled in the same manner as the original appointments were made. The person selected to fill a vacancy shall hold office for the remainder of the term of the commissioner whose office became vacant and shall be eligible for reappointment or selection for only one additional term.

(H) ADMINISTRATIVE EXPENSES.

The members of the Judicial Nominating Commission shall receive no salary or other compensation for their services, but shall receive their necessary traveling and other expenses incurred in the discharge of their official duties.

SECTION 18. ELECTION OF TRIAL JUDGES.

(A) Circuit Judges and District Judges shall be elected on a nonpartisan basis by a majority of qualified electors voting for such office within the circuits or districts which they serve.

(B) Vacancies in these offices shall be filled by appointment by the Governor from three qualified candidates whose names are submitted by the Judicial Nominating Commission. Judges who are selected by this method shall be eligible to succeed themselves.

SECTION 19. TRANSITION PROVISION—TENURE OF PRESENT JUSTICES AND JUDGES—JURISDICTION OF PRESENT COURTS.

(A) TENURE OF PRESENT JUSTICES AND JUDGES.

(1) Justices of the Supreme Court and Judges of the Court of Appeals in office at the time this Amendment takes effect shall continue in office until the end of the terms for which they were elected or appointed.

(2) All Circuit, all Chancery, and all Circuit-Chancery Judges in office at the time this Amendment takes effect shall continue in office as Circuit Judges until the end of the terms for which they were elected or appointed; provided further, the respective jurisdictional responsibilities for matters legal, equitable or juvenile in nature as presently exercised by such Judges shall continue until changed pursuant to law.

(3) Municipal Court Judges in office at the time this Amendment takes effect shall continue in office until December 31, 1996, and all jurisdiction vested in municipal, corporation, police, mayor, justice of the peace and courts of common pleas in existence at the time of passage of this Amendment shall be vested in the municipal court until December 31, 1996; provided, should a vacancy occur in an office of a Municipal Judge, that vacancy or term of office shall be filled for a term which shall end December 31, 1996.

(B) JURISDICTION OF PRESENT COURTS.

(1) The jurisdiction conferred on Circuit Courts established by this Amendment includes all matters previously cognizable by Circuit, Chancery and Probate Courts. The geographic circuits and subject matter divisions of these courts existing at the time this Amendment takes effect shall become circuits and divisions of the Circuit Court as herein established until changed pursuant to this Amendment.

Circuit Courts shall assume the jurisdiction of Circuit, Chancery and Probate Courts.

(2) District Courts shall have the jurisdiction vested in Municipal, Corporation, Police, Mayor's, Justice of the Peace Courts and Courts of Common Pleas at the time this Amendment takes effect. District Courts shall assume the jurisdiction of these Courts of limited jurisdiction and other jurisdiction conferred in this Amendment on January 1, 1997.

(C) CONTINUATION OF COURTS.

The Supreme Court provided for in this Constitution shall be a continuation of the Supreme Court now existing. The Court of Appeals shall be regarded as a continuation of the Court of Appeals now existing. All laws and parts of laws relating to the Supreme Court and to the Court of Appeals which are not in conflict or inconsistent with this Amendment shall remain in full force and effect and shall apply to the Supreme Court and Court of Appeals, respectively, established by this Amendment until amended, repealed or superseded by appropriate action of the General Assembly or the Supreme Court pursuant to this Amendment. The Circuit Courts shall be regarded as a continuation of the Circuit, Chancery, Probate and Juvenile Courts now existing. The District Courts shall be regarded as a continuation of the Municipal Court, Police Courts, Mayor's Courts, and Justice of Peace Courts now existing. All the papers and records pertaining to said courts shall be transferred accordingly and no suit or prosecution of any kind or nature shall abate because of any change made by this Amendment. All writs, actions, suits, proceedings, civil or criminal liabilities, prosecutions, judgments, decrees, orders, sentences, regulations, causes of action and appeals existing on the effective date of this Amendment shall continue unaffected except as modified in accordance with this Amendment.

APPENDIX C
ARKANSAS CODE OF 1987 ANNOTATED* AND ARKANSAS CONSTITUTION
AMEND. LXVI. JUDICIAL DISCIPLINE AND DISABILITY COMMISSION.

[Current through amendments of Act 561 of the 1993 Regular Session]

(a) Commission: Under the judicial power of the State, a Judicial Discipline and Disability Commission is established and shall be comprised of nine persons: three justices or judges, appointed by the Supreme Court; three licensed attorneys in good standing who are not justices or judges, one appointed by the Attorney General, one by the President of the Senate, and one by the Speaker of the House; and three members appointed by the Governor. The members appointed by the Governor shall not be justices or judges, retired justices or judges, or attorneys. Alternate members shall be selected and vacancies filled in the same manner.

(b) Discipline, Suspension, Leave, and Removal: The Commission may initiate, and shall receive and investigate, complaints concerning misconduct of all justices and judges, and requests and suggestions for leave or involuntary disability retirement. Any judge or justice may voluntarily request that the Commission recommend suspension because of pending disciplinary action or leave because of a mental or physical disability. Grounds for sanctions imposed by the Commission or recommendations made by the Commission shall be violations of the professional and ethical standards governing judicial officers, conviction of a felony, or physical or mental disability that prevents the proper performance of judicial duties. Grounds for suspension, leave, or removal from office shall be determined by legislative enactment.

(c) Discipline: If, after notice and hearing, the Commission by majority vote of the membership determines that grounds exist for the discipline of a judge or justice, it may reprimand or censure the judge or justice, who may appeal to the Supreme Court. The Commission may, if it determines that grounds exist, after notice and hearing, and by majority vote of the membership, recommend to the Supreme Court that a judge or justice be suspended, with or without pay, or be removed, and the Supreme Court, en banc, may take such action. Under this amendment, a judge who also

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has executive or legislative responsibilities shall be suspended or removed only from judicial duties. In any hearing involving a Supreme Court justice, all Supreme Court justices shall be disqualified from participation.

(d) Leave and Retirement: If, after notice and hearing, the Commission by majority vote of the membership determines that a judge or justice is unable because of physical or mental disability to perform the duties of office, the Commission may recommend to the Supreme Court that the judge or justice be granted leave with pay or be retired, and the Supreme Court, en banc, may take such action. A judge or justice retired by the Surpeme Court shall be considered to have retired voluntarily as provided by law.

(e) Vacancies: Vacancies created by suspension, the granting of leave or the removal of a judge or justice, or vacancies created by disqualification of justices, shall be filled as provided by law.

(f) Rules: The Supreme Court shall make procedural rules implementing this amendment and setting the length of terms on the Commission.

(g) Cumulative Nature: This amendment is alternative to, and cumulative with, impeachment and address authorized by this Constitution.

Publisher's Notes. This amendment was proposed by Senate Joint Resolution 5 (see Acts 1987, p. 2880) and was adopted at the 1988 general election by a vote of 431,864 for and 286,699 against.

ARKANSAS CODE OF 1987 ANNOTATED

Title 16. Practice, Procedure, and Courts, Subtitle 2. Courts and Court Officers, Chapter 10. General Provisions Subchapter, 4. Judicial Discipline and Disability Commission.

16-10-401 Definitions.

The word "judge" in this subchapter means anyone, whether or not a lawyer, who is an officer of the judicial system performing judicial functions, including an officer such as a referee, special master, court commissioner, or magistrate, whether full-time or part-time.

16-10-402 Creation.

(a) There is hereby established a committee to be known as the Arkansas Judicial Discipline and Disability Commission, hereinafter referred to as the "commission", consisting of nine (9) members, each of whom shall be residents of Arkansas, and shall be appointed as follows:

(1) Three (3) members shall be judges of the Arkansas Court of Appeals, circuit court, chancery court, or municipal court appointed by the Arkansas Supreme Court.

(2) Three (3) members shall be lawyers admitted to practice in Arkansas who are not judges or former or retired judges, one (1) of whom shall be appointed by the Attorney General, one (1) by the President of the Senate, and one (1) by the Speaker of the House; and

(3) Three (3) members, who are neither lawyers, or judges, or former or retired judges, appointed by the Governor.

(b)(1) A commission member shall serve for a term of six (6) years and shall be eligible for reappointment to a second full term.

(2) A member appointed to a term of less than six (6) years or to fill an unexpired term may be reappointed to two (2) full terms.

(3) The appointing authority for each category of commission membership shall also appoint an alternate member for each regular member appointed. An alternate member shall be appointed for a term of six (6) years and may be reappointed for a second term. An alternate member appointed to fill an unexpired term shall be eligible for an appointment for two (2) full terms.

(c) If a commission member or an alternate commission member moves out of the jurisdiction, ceases to be eligible for appointment to represent the category for which he was appointed, or becomes unable to serve for any reason, a vacancy shall occur, an appointment to fill a vacancy for the duration of its unexpired term shall be made by the appropriate appointing authority, effective no later than sixty (60) days from the occurrence of the vacancy. If a vacancy is not filled in accordance with this paragraph, the Chief Justice of the Supreme Court shall, within ten (10) days thereafter, appoint, from the category to be represented, a member who shall serve for the duration of the unexpired term.

(d) Commission members shall serve without pay, but shall be entitled to maximum per diem expenses as authorized by the General Assembly for each day attending meetings of the commission or in attending to official business as authorized by the commission, and, in addition thereto, shall be entitled to mileage for official travel in attending commission meetings or other official business of the commission, at the rate provided by law or state travel regulations for reimbursement to state employees for official state travel.

16-10-403 Directors—Staff.

(a) The commission shall employ a director and such additional professional and clerical staff as may be authorized, from time to time, by appropriation passed by the General Assembly.

(b) Effective July 1, 1994, the Director of the Judicial Discipline and Disability Commission shall be an attorney licensed to practice in the State of Arkansas.

(c) The director shall not engage in the practice of law nor serve in a judicial capacity during his or her employment.

16-10-404 Duties—Records.

(a) The commission shall initiate or shall receive information, conduct investigation and hearings, and make recommendations to the Arkansas Supreme Court concerning:

(1) Allegations of judicial misconduct;

(2) Allegations of physical or mental disability of judges requiring leave or involuntary retirement; and

(3) Matters of voluntary retirement or leave for disability.

(b)(1) Investigatory records, files, and reports of the commission are confidential, and no disclosure of information, written, recorded, or oral, received or developed by the commission in the course of an investigation related to alleged misconduct or disability of a judge, shall be made except as follows:

(A) Upon waiver in writing by the judge at any stage of the proceedings;

(B) Upon inquiry by an appointing authority or by a state or federal agency conducting investigations on behalf of such authority in connection with the selection or appointment of judges;

(C) In cases in which the subject matter or the fact of the filing of charges has become public, if deemed appropriate by the commission, it may issue a statement in order to confirm the pendency of the investigation, to clarify the procedural aspects of the proceedings, to explain the right of the judge to a fair hearing, and to state that the judge denies the allegations;

(D) Upon inquiry in connection with the assignment or recall of a retired judge to judicial duties, by or on behalf of the assigning authority;

(E) Upon the commission's taking final action with respect to a complaint about a judge, notice of the final action shall become public information;

(F) Where the circumstances necessitating the initiation of an inquiry include notoriety, or where the conduct in question is a matter of public record, information concerning the lack of cause to proceed shall be released by the commission;

(G) If, during the course of or after an investigation or hearing, the commission reasonably believes that there may have been a violation of any rules of professional conduct of attorneys at law,

the commission may release such information to any committee, commission, agency, or body within or outside of the state empowered to investigate, regulate, or adjudicate matters incident to the legal profession; or

(H) If, during the course of or after an investigation or hearing, the commission reasonably believes that there may have been a violation of criminal law, the commission shall release such information to the appropriate prosecuting attorney.

(2) All proceedings held prior to a determination of probable cause and the filing of formal charges shall be confidential. Any hearing scheduled after the filing of formal charges shall be open to the press and to the public, except that, following the completion of the introduction of all evidence, the commission may convene to executive session for the purpose of deliberating its final conclusions and recommendations, provided that, upon completion of the executive session, the final action of the commission shall be announced in an open and public session.

(3) The commission is authorized to request the appropriate prosecuting authorities to seek to obtain immunity from criminal prosecution for a reluctant witness using the procedure outlined in § 16-43-601 et seq.

16-10-405 Rules.

The Arkansas Supreme Court shall adopt rules with regard to all matters of commission operations and all disciplinary and disability proceedings and promulgate rules of procedure.

16-10-406 Immunity from suit.

Members of the commission, referees, commission counsel and staff shall be absolutely immune from suit for all conduct in the course of their official duties.

16-10-407 Leave.

Grounds for leave consist of a temporary physical or mental incapacity which impairs the ability of the judge to substantially perform the duties of his or her judicial office and which exists or is likely to exist for a period of one (1) year or less. Leave cannot be granted to exceed one (1) year.

16-10-408 Suspension with pay.

A judge may be suspended by the Supreme Court with pay:

(1) While an indictment or information charging him or her in any court in the United States with a crime punishable as a felony under the laws of Arkansas or the United States is pending:

(2) While a recommendation to the Supreme Court by the commission for his or her removal, or involuntary disability retirement is pending; or

(3) When articles of impeachment have been voted by the House of Representatives.

16-10-409 Mandatory suspension.

A judge shall be suspended from office with pay by the Supreme Court when in any court in the United States he pleads guilty or no contest to, or is found guilty of an offense punishable as, a felony under the laws of Arkansas or the United States, or of any other offense that involves moral turpitude. If his conviction becomes final, he may be removed from office pursuant to § 16-10-410. If his conviction is reversed and he is cleared of the charge, by order of the court, whether without further trial or after further trial and a finding of not guilty, his suspension terminates. Nothing in this section shall prevent the commission from determining that a judge be disciplined or removed according to § 16-10-410.

16-10-410 Removal from office.

(a) The grounds for removal conferred by this subchapter shall be both alternative and cumulative to the power of impeachment provided by the Constitution and removal otherwise provided by law.

(b) A judge may be removed from office on any of the following grounds:

(1) Conviction of any offense punishable as a felony under the laws of Arkansas or the United States;

(2) Conviction of a criminal act that reflects adversely on the judge's honesty, trustworthiness, or fitness as a judge in other respects;

(3) The commission of conduct involving dishonesty, fraud, deceit, or misrepresentation;

(4) The commission of conduct that is prejudicial to the administration of justice;

(5) Willful violation of the Code of Judicial Conduct or Professional Responsibility;

(6) Willful and persistent failure to perform the duties of office;

(7) Habitual intemperance in the use of alcohol or other drugs.

(c) In considering recommending removal, the commission may consider the frequency of the offense, the motivation of the conduct, the length of time since the conduct in question, and similar factors.

(d) Any judge removed from office pursuant to this subchapter cannot be appointed thereafter to serve as a judge.

16-10-411 Vacancy.

The granting of leave, suspension, with or without pay, removal, or involuntary disability retirement pursuant to this subchapter shall create a vacancy in the judicial office.