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# The Merit Plan for Judicial Selection and Tenure—Its Historical Development

*Glenn R. Winters\**

In the 1968 Pennsylvania primary election the voters of that state adopted in toto the recommendations of their constitutional convention. Included among these recommendations was a revision of the Pennsylvania judicial article. This revision contained as one important element a proposal for the adoption of what has come to be known as the Merit Plan for judicial selection and tenure.<sup>1</sup>

As set forth in the draft article prepared by the Pennsylvania Bar Association's "Project Constitution"<sup>2</sup> and adopted by the voters,<sup>3</sup> this plan calls for appointment of certain Pennsylvania judges by the governor of the state from lists of names submitted to him by a judicial nominating commission. Judges appointed under this proposal would serve a probationary period extending until the first municipal election occurring more than twenty-four months after their appointment. At this time their names would be submitted to the voters for approval without competing candidates. The sole question for the voters would be whether or not the named judge should be retained in office. Upon receiving an affirmative vote, the judge would remain for a term of ten years, after which a similar vote again would be taken; if the vote should prove negative, the office would become vacant and the vacancy would be filled by the process of nomination and appointment.

There are three distinguishing features of this plan:

1. Nomination by a commission.
2. Selection by appointment.
3. Tenure by vote of the people in a non-competitive election.

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1. This amendment provides that the merit plan shall be merely an option and shall not go into effect unless specifically approved by the voters in the 1969 primary election. PA. CONST. art. V, § 13(d).

2. "Project Constitution" was an undertaking in 1961 by the Pennsylvania Bar Association to study Pennsylvania's constitution and make recommendations for its modernization. 33 PA. B. ASS'N Q. 14-20 (1961); 33 PA. B. ASS'N Q. 365-66 (1962). In 1963 the membership of the Association decided on an article by article approach to amending the constitution and approved 23 separate amendments. Also in 1963 the Board of Governors of the Association created a special committee on Project Constitution. 34 PA. B. ASS'N Q. 147-325, 605, 606 (1963).

3. See note 1 *supra*, and accompanying text.

These together comprise what has come to be known as the Merit Plan. They are found in just that pattern in eight states—Alaska, Colorado, Florida, Iowa, Kansas, Missouri, Nebraska and Oklahoma.<sup>4</sup> They also occur in other combinations—nomination and appointment without the non-competitive election in five states—Alabama, Idaho, New York, Utah and Vermont and in the Commonwealth of Puerto Rico;<sup>5</sup> the non-competitive election without the nominating commission in California and Illinois.<sup>6</sup> Adding together these three groups makes possible the statement that some or all of the Merit Plan is in use with respect to some or all of the judges of fifteen states and the Commonwealth of Puerto Rico.

An indication of the present-day surge in popularity of the Merit Plan as a reform measure may be found in the fact that of the fifteen states mentioned, ten or two-thirds of them, adopted it in the decade of the '60's.<sup>7</sup> The legislature of Indiana in 1967 gave a new judicial article containing it the first of two successive passages needed to submit it to the voters.<sup>8</sup> It was approved by the Maryland constitutional convention of 1968 (although the constitution as a whole was defeated on other grounds), and was narrowly defeated in the Hawaii constitutional convention and in a North Dakota election in September, 1968.<sup>9</sup> The list of

4. Alaska, supreme and superior courts, ALASKA CONST. art. IV, §§ 5-9, ALASKA STAT. §§ 22.05.080, 22.05.100, 22.10.100, 22.10.120, 22.10.150; Colorado, all courts of record, COLO. CONST. art. VI; Florida, Metropolitan Court of Dade County (Miami), Home Rule Charter §§ 603, 6.04 and 6.06; Iowa, supreme court and district courts, IOWA CONST., art. V, §§ 15-18; Kansas, supreme court, KANSAS CONST. art. III, § 2; Missouri, supreme court, courts of appeal, circuit courts of St. Louis and Jackson County, probate courts of St. Louis and Jackson County, St. Louis Court of Criminal Correction; may be extended by local option (but has not been) to all courts of record, MO. CONST. art. V, § 29; Nebraska, Supreme and District Courts, NEB. CONST. art. V, § 21; Oklahoma, supreme court and court of criminal appeals, OKLA. CONST. art. VII-B.

These citations and a chart showing the courts to which the provisions apply may be found in G. WINTERS, *SELECTED READINGS: JUDICIAL SELECTION AND TENURE 185* (1967).

5. Alabama circuit court of Jefferson County, ALA. CONST. amend. LXXXIII and CX; Idaho, supreme court and district court, IDAHO CONST. art. V, § 19, Idaho Session Laws 1967, ch. 67; New York, criminal court of New York City, family court and interim vacancies to Civil Court of New York City by voluntary action of Mayor John V. Lindsay. See 49 J. AM. JUD. SOC'Y 197 (1966). Utah, supreme and district courts, UTAH CODE ANN. §§ 20-1-7.1 to 7.9; Vermont, supreme, superior and district courts, VT. STAT. ANN. tit. 4, §§ 571-76 as amended, 1968; Puerto Rico, superior and district courts by voluntary action of Governor Roberto Sanchez Vilella. See 49 J. AM. JUD. SOC'Y 198 (1966).

6. California, supreme and district courts of appeal, CAL. CONST. art. VI, § 26; Illinois, supreme, appellate, district and circuit courts, ILL. CONST. art. V, §§ 10, 11.

7. Colorado, 1966; Florida, 1963; Idaho, 1967; Illinois, 1962; Iowa, 1962; Nebraska, 1962; New York, 1966; Oklahoma, 1967; Utah, 1967; Vermont, 1966. Puerto Rico also adopted its voluntary use of merit selection in this period (1966).

8. *Indiana General Assembly Gives Initial Approval to Amendment*, 50 JUD. 281 (1967).

9. Adkins and Fairbanks, *The Annapolis Achievement*, 51 JUD. 288 (1968); *Maryland Constitution is Defeated*, 52 JUD. 37 (1968). *Oklahomans, North Dakotans Defeat Judicial Reform Proposals*, 52 JUD. 169 (1968); *Hawaii Con-Con Defeats Merit Selection, Lengthens Judges' Terms*, 52 JUD. 171 (1968).

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other states moving toward merit selection is nearly as long as those that are not.<sup>10</sup>

The plan here referred to as the Merit Plan has several other names as well. It is called the Missouri Plan after the first state to use it, the American Bar Association Plan, after ABA endorsement of it in 1937,<sup>11</sup> the American Judicature Society Plan and the Kales Plan.

The "Kales" referred to was Albert M. Kales, professor of law at Northwestern University in the early years of this century. Shortly after the founding of the American Judicature Society in 1913, Kales accepted the post of "director of drafting," and over the next several years the Society produced a remarkable series of drafts of legislative and constitutional measures embodying important new proposals in court and bar organization, civil and criminal procedure, judicial selection and tenure, and related fields.<sup>12</sup> The judicial selection drafts contained a crystallization of ideas that Kales had first advanced in his book *Unpopular Government in the United States*.<sup>13</sup>

Texts of present day versions of the Merit Plan, both adopted and pending, differ in some respects from what Professor Kales was advocating in 1914. This is not surprising. Indeed, it would have been

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10. Alabama, Arizona, Arkansas, California, Georgia, Kentucky, Minnesota, Mississippi, Montana, Nevada, New Mexico, Ohio, Pennsylvania, Tennessee, Washington, West Virginia and Wyoming.

11. The House of Delegates of the A.B.A. adopted the following resolution in the 1937 annual meeting; 62 A.B.A. REP. 893 (1937):

Whereas, the importance of establishing methods of judicial selection that will be most conducive to the maintenance of a thoroughly qualified and independent judiciary that will take the state judges out of politics as nearly as may be, is generally recognized; and

Whereas, in many states movements are under way to find acceptable substitutes for direct election of judges;

Now therefore be it resolved, by the House of Delegates of the American Bar Association that in its judgment the following plan offers the most acceptable substitute available for direct election of judges:

(a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.

(b) If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the state senate or other legislative body, of appointments made through the dual agency suggested.

(c) The appointee after a period of service should be eligible for reappointment periodically, or periodically go before the people upon his record, with no opposing candidate, the people voting upon the question, "Shall Judge Blank be retained in office?"

12. *An Act to Establish a Model Court for a Metropolitan District*, 4 AM. JUD. SOC'Y BULL. (1914), and subsequent revisions contained in 4-A AM. JUD. SOC'Y BULL. (1915) and 4-B AM. JUD. SOC'Y BULL. (1916); *State-Wide Judicature Act*, 7 AM. JUD. SOC'Y BULL. (1914); and a revision in 7-A AM. JUD. SOC'Y BULL. (1917); *Rules of Civil Procedure*, 14 AM. JUD. SOC'Y BULL. (1919); *Judicial Council Act*, 5 J. AM. JUD. SOC'Y 107-109 (1921).

13. A. KALES, *UNPOPULAR GOVERNMENT IN THE UNITED STATES* (1914).

surprising if there had not been considerable evolution in judicial reform thinking over such a span of time. By the same token, others before Kales had been studying the problems of judicial selection and tenure and had offered their own ideas, some of which were clearly forerunners of the Kales proposals.

At a time when prospects seem good that by the end of the next decade the Merit Plan will have supplanted popular election as the dominant mode of judicial selection in this country, it seems appropriate to pause to examine the origins of this plan and trace its development, not only in the constitutions and statute books but in the thinking and writings of men like Kales, Roscoe Pound, Herbert Harley, John Perry Wood and others.

The train was already moving when Albert Kales climbed aboard. The elective judiciary got its start in the 1840's nearly three-quarters of a century after 1776.<sup>14</sup> It swept the country, except for certain Atlantic seaboard states, during the next 50 years,<sup>15</sup> but by the close of the 19th century disenchantment had begun to set in. Listings under the heading "judges" in the *Index to Legal Periodicals* for the years around the turn of the century and the first decade of this century reveal a growing awareness of the judicial selection problem and some groping for answers. Articles in the *American Lawyer* in 1903 and 1905 on "An Elective Judiciary—Its Defects,"<sup>16</sup> and "Influence of the Bar in the Selection of Judges Throughout the United States,"<sup>17</sup> are a clue. The most widely quoted sentence in Roscoe Pound's famous 1906 address on "The Causes of Popular Dissatisfaction with the Administration of Justice"<sup>18</sup> was this one: "Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."<sup>19</sup>

Most significant in the pre-Kales era was a symposium on "What is the Best Method for Selecting Judges and Solicitors-General?" at the 1909 annual meeting of the Georgia Bar Association.<sup>20</sup> Two proposals

14. Winters, *A Better Way to Select our Judges*, 34 J. AM. JUD. Soc'y 167-168 (1951).

15. HAYNES, *THE SELECTION AND TENURE OF JUDGES*, ch. 4 (1944). Haynes, at 100, reports that Mississippi in 1832 was the first state to elect all judges. New York followed Mississippi in 1846. "Within 10 years, fifteen of the twenty-nine states existing in 1846 had by constitutional amendment provided for the popular election of judges, and of the states which have entered the Union since 1846, every one has provided that most or all judges shall be popularly elected for terms of years."

16. 11 AM. LAW. 288 (1903).

17. 13 AM. LAW. 165 (1905).

18. The speech is reprinted in 46 J. AM. JUD. Soc'y 55 (1962).

19. 46 J. AM. JUD. Soc'y 55, 66 (1962).

20. REPORT OF THE 26TH ANNUAL SESSION OF THE GEORGIA BAR ASSOCIATION 208-229 (1909).

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offered there are noteworthy. John T. Norris suggested that the governor send three names to the state senate, which would make the final selection.<sup>21</sup> Hewlett A. Hall proposed that the judges of the court of last resort be elected and that the trial judges be nominated by the supreme court, appointed by the governor, and confirmed by the senate.<sup>22</sup>

In 1913 the American Bar Association met in Montreal, and William Howard Taft, then a former president and future chief justice of the United States, addressed it on the subject of selection of judges. He severely criticized both partisan and non-partisan election and urged a return to the appointive system.<sup>23</sup>

It was in this climate that the American Judicature Society was founded and Albert M. Kales entered upon his work as its director of drafting. It is important to look carefully at what Kales both did and did not propose at that time. Our main sources are his *Unpopular Government* book, and the selection and tenure features of the Model State-Wide Judicature Act,<sup>24</sup> and the Model Court for a Metropolitan District,<sup>25</sup> which he drafted.

Kales proposed first that vacancies in the judiciary should be filled by appointment by the chief justice who should himself be chosen by the electorate at fairly frequent intervals.<sup>26</sup> This is strongly reminiscent of the Georgia proposal for nomination of trial judges by an elected supreme court. Kales offered many of the same reasons as did Hall,<sup>27</sup> and in addition he cited the successful experience in New Jersey of vice chancellors appointed by the chancellor.<sup>28</sup>

The second element of the original Kales plan was a device to avoid the arbitrariness often thought (both then and now) to be associated with life tenure. Kales mentioned several possible ways of limiting the judges' tenure, and then offered this suggestion:

The appointment might be for a probationary period—say three years—at the end of which time the judge must submit at a popu-

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21. *Id.* at 218.

22. *Id.* at 225, 226.

23. 38 AM. B. ASS'N REP. 418-35 (1913). See especially pages 421-24.

24. 7 AM. JUD. SOC'Y BULL. (1914).

25. 4 AM. JUD. SOC'Y BULL. (1914).

26. In Kales' words, "The most promising [method of selection] is the conspicuous and legal appointment by a chief justice elected at large in the district at frequent intervals." A. KALES, UNPOPULAR GOVERNMENT IN THE UNITED STATES 251 (1914) (hereinafter cited as KALES). See also 4 AM. JUD. SOC'Y BULL. 29-40 (1914), 4 AM. JUD. SOC'Y BULL. 47-89 (1915), 7 AM. JUD. SOC'Y BULL. 38-39, 61-62, 84-87 (1914).

27. KALES, at 239-44.

28. *Id.* at 239 n.1.

lar election to a vote on the question as to whether the place which he holds shall be declared vacant. This is not a vote which puts anyone else in the judge's place, but a vote which can at most only leave the place to be filled by the appointing power. Such a plan must necessarily promote the security of the judge's tenure if at the popular election his office be not declared vacant. After surviving such a probationary period his appointment should continue for—let us say—six or nine years. At the end of that time the question might again be submitted as to whether his place should be declared vacant.<sup>29</sup>

This constitutes a very clear enunciation of the principle of tenure by noncompetitive election, and as far as I have been able to determine it was entirely original with Kales, no hint of such a device having been found in any prior writings that have come to my attention. This device remains a feature of the Merit Plan in substantially the same form today and it is in actual operation in ten states.<sup>30</sup>

It has been protested that since the heart of the Merit Plan is the nominating commission, and since Kales did not include a nominating commission in his proposals, it is therefore an inaccuracy to call the Merit Plan the Kales Plan. I would go so far as to agree that present-day merit plans differ from the things Kales proposed in all three respects—nomination, appointment and elective tenure—but no more than normal and proper evolution of ideas in the stimulating and creative intellectual atmosphere of those years would naturally bring about. The basic principles of the three features of merit selection and tenure, including the nominating commission, are to be found in that same historic Kales book written in 1914.

Kales proposed that the chief justice and the presiding justices of all the divisions of the court should form a judicial council with administrative and disciplinary powers. As a "slight but reasonable control"<sup>31</sup> upon the appointing power of the chief justice he proposed:

"The judicial council should be given power to appoint upon an eligible list for each division of the court twice as many members of the bar as there are judges in the division. The chief justice, in appoint-

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29. *Id.* at 246.

30. Alaska, ALASKA CONST. art. IV, § 6; California, CAL. CONST. art. VI, § 26; Colorado, COLO. CONST. art. VI, § 25; Florida, Dade County Home Rule Charter, § 6.04; Illinois, ILL. CONST. art. V, § 11; Iowa, IOWA CONST. art. V, § 17; Kansas, KANSAS CONST. art. III, § 2(e); Missouri, MO. CONST. art. IV, § 29(c)(1); Nebraska, NEB. CONST. art. V, § 21; Oklahoma, OKLA. CONST. art. VII-B. A chart indicating the use of non-competitive elections is contained in G. WINTERS, SELECTED READINGS: JUDICIAL SELECTION AND TENURE 185 (1967).

31. KALES, at 250.

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ing judges to a place in any division of the court, should be required to select from this eligible list on the occasion of every other appointment at least.”<sup>32</sup>

There are differences of course between this judicial council and its eligible list, and a present-day Missouri or Nebraska commission submitting three names to a governor. It is, however, the prior participation (as distinguished from subsequent approval or confirmation) of a group of knowledgeable people charged with the responsibility of making an affirmative search for judicial talent and making the names of a list of such persons available to the appointing authority, with a requirement that, at least part of the time, he must restrict his appointments to only names so listed.

It is fair to say that this council was at least a rudimentary nominating commission. Nomination by the council, appointment by the elected chief justice, and tenure by non-competitive election, all set forth explicitly in Kales’ 1914 book, establish beyond dispute the propriety of referring to a present-day nominative-appointive-elective plan as the Kales plan.

The judicial selection provisions of the state-wide and metropolitan court acts which Kales drafted during the next year or two were simply legislative embodiments of the Kales proposals advanced in the *Unpopular Government* book. Herbert Harley, founder and first secretary of the American Judicature Society, took the next step in a 1916 article, proposing mandatory appointment from the Council’s nominations in all instances, rather than just every other one.<sup>33</sup>

In 1920 Amos C. Miller proposed a plan subsequently approved by the Illinois Constitutional Convention of 1922, requiring the governor to appoint judges in Cook County not from a standing eligible list but from an *ad hoc* list of four names submitted to him by the state supreme court.<sup>34</sup> At the same time the Louisiana State Bar Association was proposing in another constitutional convention gubernatorial appointment from nominations submitted by the Supreme Judicial Council, a body such as Kales had proposed, consisting of twelve judges.<sup>35</sup> These proposed Illinois and Louisiana commissions

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32. *Id.*

33. Harley, *Taking Judges Out of Politics*, 64 THE ANNALS 184 (1916). See especially page 193.

34. 4 J. AM. JUD. SOC’Y 31 (1920); 5 J. AM. JUD. SOC’Y 50-52 (1921); 6 J. AM. JUD. SOC’Y 5 (1922).

35. *The Special Committee on Judiciary Ordinance of the New Constitution*, REP. LA. B. ASS’N at 20-21 (1920); 5 J. AM. JUD. SOC’Y at 19-25 (1921).



differed from present-day commissions only in the composition of the nominating body.

All nominating proposals so far mentioned have involved judges only. Harold J. Laski, a brilliant American lawyer who made a name for himself in the English legal world and is well remembered for his voluminous published correspondence with Oliver Wendell Holmes,<sup>36</sup> contributed a very scholarly article to the *Michigan Law Review* in 1926 on "Techniques of Judicial Appointment."<sup>37</sup> Laski proposed gubernatorial appointment with the aid of an advisory committee consisting of a judge of the supreme court, the attorney general and the president of the state bar association. Here, for the first time, we find a lawyer as well as judges participating in the nominating function. In the same year, Charles E. Matson proposed to the Nebraska State County Attorneys Association an elected "State Commission for Selection and Appointment of Judges."<sup>38</sup> This body would have had the full appointing power, and it is noteworthy in that it is the first proposal in which laymen might have had a part, since it was not specifically restricted either to judges or to lawyers and judges. A strong proposal for a commission like Matson's, with actual appointing power, has been advanced very recently by Jason L. Honigman, for consideration as an amendment to the Michigan judicial article.<sup>39</sup>

It is perhaps well to pause and reflect that these are not actualities that have been described so far, but only the thoughts and ideas of men in whose minds important frontiers of judicial administration were being pushed back.

In 1928, two years after the Laski article, Herbert Harley wrote a thoughtful editorial proposing that the governor, not the chief justice, pick from an eligible list and that the list be compiled through use of a bar plebiscite.<sup>40</sup> From this time forward, little or nothing is heard about appointment by an elected chief justice, and more and more is heard about bar participation in both judicial appointments and judicial elections. This idea has reached its zenith in the truly tremendous contribution in recent years by the American Bar Association through

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36. HOLMES-LASKI LETTERS (Howe ed., 1953).

37. 24 MICH. L. REV. 529-543 (1926).

38. 14 J. AM. JUD. SOC'Y at 13, 14 (1930).

39. Selected Readings on the Administration of Justice and Its Improvement—Michigan Citizens Conference on Judicial Selection and Tenure, at 69 (1967). The proposal received much favorable discussion in the conference, but the final consensus was in favor of a nominating commission.

40. 11 J. AM. JUD. SOC'Y at 132 (1928).

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its Committee on Federal Judiciary which screens candidates and advises the U.S. Justice Department in regard to federal judicial appointments.<sup>41</sup>

The year 1931 marked an important development in the evolution of the Merit Plan, for it is then that we find the first suggestion of the final element in the present-day nominating commission—the lay citizen member. The occasion was an editorial discussion of a proposal in *The Panel*, a publication of the Grand Jury Association in New York, for a non-partisan commission to make recommendations for judicial elections in New York.<sup>42</sup> It was said of this proposal:

“The article quoted does not disclose the nature or source of the proposed commission, which is the keystone of the project. But we assume that it is to be an unofficial and unsalaried commission composed of delegates from the bar and various *citizen organizations*.”<sup>43</sup> (Italics added.)

It remained for Walker B. Spencer of Louisiana to put together for the first time all of the various elements of which we have been speaking—

1. A commission
2. composed of judges
3. and lawyers
4. and laymen
5. to submit nominations
6. to the governor
7. for appointment
8. subject to tenure by non-competitive election.

Mr. Spencer spoke at the 1931 annual meeting of the American Judicature Society,<sup>44</sup> and he included all of those elements in his description of the plan which I have previously mentioned as having been introduced in the Louisiana Constitutional Convention of 1921.<sup>45</sup> It is very clear that this is not an accurate description of the plan that was actually introduced, which, as I have indicated, called for an all-

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41. B. G. Segal, *Federal Judicial Selection—Progress and the Promise of the Future*, 46 MASS. L.Q. 138-151 (1961). Segal was the chairman of the ABA Committee on the Federal Judiciary from 1956 to 1964. Its reports are to be found in each of the annual volumes of *American Bar Association Reports* since 1952. See, e.g., 91 ABA REP. 484-495 (1966).

42. Mandelker, *The Selection of Judicial Personnel*, THE PANEL, at 7-8 (Sept.-Oct. 1930).

43. 14 J. AM. JUD. SOC'Y at 190, 191 (1931).

44. 15 J. AM. JUD. SOC'Y at 76, 77 (1931).

45. See pp. 67, 68 and note 35 *supra*.

judge council, such as Albert Kales had proposed to do the nominating. However, the record is clear that the Spencer plan suffered many revisions between its original drafting and its actual introduction into the convention, and it is an unsupported but not unreasonable conjecture that in 1931 Mr. Spencer was remembering an actual version of the plan as drafted by him prior to its being amended to bow to political expediency. Ben R. Miller, author of an authoritative book on the history of the Louisiana judiciary,<sup>46</sup> has confirmed that Spencer was indeed a brilliant and original thinker and it appears that he deserves more credit than has yet been given him.

The decade of the 30's witnessed a rapid increase in professional discussion of judicial selection problems, and new ideas came thick and fast. In Georgia and Utah<sup>47</sup> there appeared proposals for appointment by the governor from lists of nominees submitted by the bar. At the 1933 American Bar Association convention in Grand Rapids, the Conference of Bar Association Delegates, forerunner of today's ABA House of Delegates, conducted a symposium on judicial selection at which numerous proposals were advanced and discussed, most of them calling for some form of bar association participation or lawyer-layman nominating commissions, with appointment by the governor.<sup>48</sup>

California came close to being the first state to bring merit selection from fantasy to fact. In 1933 the legislature approved a bar association plan for Los Angeles County under which the governor would appoint from nominations submitted by the state chief justice, the presiding justice of the court of appeals and a state senator.<sup>49</sup> It was defeated at the polls in 1934.<sup>50</sup> Much more widely known is the plan that was approved at that same election and has been in force ever since in that state, whereby the governor appoints supreme and appellate court judges with subsequent confirmation by the chief justice, the presiding justice of the court of appeals and the attorney general.<sup>51</sup> Now, 34 years later, the State Bar, the Judicial Council and Governor Ronald Reagan

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46. B. MILLER, *THE LOUISIANA JUDICIARY* (1932).

47. 16 J. AM. JUD. SOC'Y at 40-43 (1932); 16 J. AM. JUD. SOC'Y 185 (1933).

48. 19 A.B.A.J. at 669-674 (1933).

49. Text of the bar association proposed amendment is contained in 8 CALIF. S.B.J. at 54-56 (1933). Passage of the amendment by the legislature is reported in 8 CALIF. S.B.J. at 141, 191, 197 (1933).

50. 18 J. AM. JUD. SOC'Y at 102 (1934).

51. The amendment adopted was proposed by the State Chamber of Commerce. It is discussed in 9 CALIF. S.B.J. at 38, 39 (Part II, No. 9) (1934) and PROCEEDINGS OF THE 7TH ANNUAL MEETING OF THE S.B. OF CAL. 145 (1934). The plan is CAL. CONST. art. VI, § 26.

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have joined forces to procure adoption of a California Merit Plan, with commission nomination, for all California judges.<sup>52</sup>

In 1937 the ABA House of Delegates formally endorsed adoption of the Merit Plan as an Association objective,<sup>53</sup> and John Perry Wood, leader of the California movement in the 1930's, became chairman of the American Bar Association committee to lead the ABA campaign. In that capacity he came to St. Louis in 1938 to advocate a merit selection plan for Missouri.<sup>54</sup> Two years later Missouri became the first state actually to put a nominative-appointive-elective plan into operation and make "Missouri Plan" along with "Kales Plan" one of the synonyms for merit selection and tenure.<sup>55</sup> "Spencer Plan" really should be added to that list.

The form of the Missouri commission is similar to that set forth in Pennsylvania's new Constitution—three lawyers selected by the bar, three laymen appointed by the governor, and the chief justice as chairman. For circuit judges it is two and two with the presiding judge of the appellate court as chairman. In selecting this pattern the Project Constitution drafters were wisely capitalizing on more than a quarter century of very successful experience in the Show-Me-State.<sup>56</sup> It would be foolish to suppose, however, that the Missouri Plan could not be improved upon. A number of states have followed along and have devised some interesting and promising variations.

In 1963 the voters of the City and County of Denver adopted a merit plan for the Denver Municipal Court, now the County Court, with a seven man nominating commission consisting of the Denver Bar Association president, two lawyers, and four non-lawyers, with the presiding judge as a non-voting *ex officio* member.<sup>57</sup> Both lawyers and non-lawyers are appointed by the mayor, who also makes the judicial appointments. It is noteworthy that in this commission the laymen have a 4-3

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52. THE STATE BAR OF CAL. REP. 1 (Sept.-Oct. 1967).

53. 23 A.B.A.J. 104-5 (1937). See also note 11, *supra*.

54. Winters, *A Better Way to Select Our Judges*, 34 J. AM. JUD. SOC'Y 166-67 (1951).

55. "Missouri Plan" as enacted in Mo. CONST. art. V, § 29. It was passed November 1940 by a majority of 90,000 votes. A resolution was immediately introduced in the legislature to repeal the new amendment. 11 Mo. BAR. J. 209 (1940). In 1942 the voters, as a result of the above resolution had an opportunity to vote for a constitutional amendment which would repeal the Missouri Plan. The voters, in an off year election supported the Missouri Plan by over 132,000 votes. 26 J. AM. JUD. SOC'Y 100 (1942). In 1945, Missouri voters had another opportunity to vote on the "Missouri Plan" when an entire new Constitution was voted upon. Again the voters approved.

56. See Hunter, *A Missouri Judge Views Judicial Selection and Tenure*, PROCEEDINGS, A CITIZENS CONFERENCE ON THE MODERNIZATION OF PENNSYLVANIA'S JUDICIAL SYSTEM at 62-70 (1964); 48 J. AM. JUD. SOC'Y 126 (1964).

57. Denver, Colorado, Home Rule Charter, § 13.8-3.

voting majority, and also it is important to note that both lawyers and laymen are to be selected on a bi-partisan basis. The Missouri Plan is called the Non-Partisan Court Plan, but its non-partisanship consists only of a prohibition of political activity on the part of both commission members and judges. The Denver plan affirmatively requires political balance between the two major parties within the commission. The Colorado state plan adopted in 1966 follows the Denver example both as to lay majority and as to bi-partisanship.<sup>58</sup>

The Kansas commission has a lawyer elected by the bar and a non-lawyer appointed by the governor from each congressional district, plus a lawyer elected from the state at large, who is chairman. This commission has no judge at all.<sup>59</sup> The Oklahoma commission has a lawyer and a layman from each congressional district plus a thirteenth member who is a non-lawyer, chosen by the other commission members.<sup>60</sup> Thus, in Oklahoma, too, the laymen have a majority.

The most ingenious nominating commission to be adopted in recent years is that for the Utah juvenile courts. It is a five-member commission which is entirely *ex officio*, consisting of the chief justice of the supreme court, the state bar president, the chairman of the public welfare commission, the state superintendent of public instruction and the state director of public health. The first three may, if they wish, designate another member of their respective organizations, and the supreme court member is chairman of the commission.<sup>61</sup>

Yet another variation is the Vermont commission designated to aid the legislature in exercise of its legislative appointment power. Not surprisingly, members of the legislature are in the majority, three of each house with at least one each from the minority party, plus two laymen appointed by the governor and three lawyers elected by the bar association.<sup>62</sup>

A closer examination of the proposed Pennsylvania Merit Plan reveals it to be similar to all of the plans described above, but identical to none. The delegates who drafted the Pennsylvania merit plan evaluated those plans adopted by other states and produced yet another variation on the theme.

Of the three distinguishing features comprising the merit plan for

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58. COLO. CONST. art. VI, § 24.

59. KANSAS CONST. art. 3, § 2(f).

60. OKLA. CONST. art. VII-B § 3.

61. UTAH CODE ANN. § 55-10-69 (1965).

62. VT. STAT. ANN. tit. 4, § 571 (1966).

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the selection of judges, selection by appointment and tenure by vote of the people in a non-competitive election are very similar to corresponding stages in those plans already in existence. The actual appointment of one of the nominees by the governor is common to all of the state-wide plans in effect.<sup>63</sup> The retention and tenure stage, whereby a judge may retain his position through a non-partisan, non-competitive election following a probationary period, is part of merit plans in ten other states.<sup>64</sup> This probationary period in the Pennsylvania plan extends from the time of appointment to the first municipal election occurring twenty-four months or more after said appointment.<sup>65</sup>

The first stage in the process of selecting judges is the nomination and it is here that we see the uniqueness of the Pennsylvania merit plan. This stage commonly involves the appointment of laymen, members of the bar and judges to positions on a nominating commission. The opportunity for variation is greatest at this stage because of the many possible combinations in the composition of the nominating commission. The Pennsylvania nominating commission represents both a previously untried formula and an effort to incorporate the best features of other plans.<sup>66</sup>

The nominating commission, to be known as the Judicial Qualifications Commission,<sup>67</sup> combines the unique features of both the Colorado and Kansas plans.<sup>68</sup> It consists of seven members: four laymen appointed by the governor and three members of the Pennsylvania Bar to be appointed by the Supreme Court of Pennsylvania. Commission members are to be appointed for seven year terms on a staggered basis with one member nominated each year. In an endeavor to insure as near as possible a non-partisan selection of nominees, the plan prohibits more than four members of the commission from being members of the same political party. Too, commission members may hold neither a paid political office nor an office in a political organization.<sup>69</sup>

Should a vacancy occur for any reason on the benches of the Supreme Court, Superior Court or any other state-wide court, the commission would then submit the names of from ten to twenty qualified persons

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63. See text at pp. 70-72.

64. See note 7, *supra*.

65. PA. CONST. art. V § 13(e).

66. Preparatory Committee for the Constitutional Convention, *The Judiciary*, Reference Manual No. 5, Part II §§ 7.3.3, 7.3.4.

67. PA. CONST. art. V, § 14.

68. The Kansas plan has no judge on its nominating commission and the Colorado plan has a majority of laymen on its commission. See text at pp. 71, 72.

69. PA. CONST. art V § 14b.

to the governor. From that list he would select and appoint one person to fill the vacancy. Additionally, such appointments would not require the consent of the Senate.

Acceptance of the Merit Plan by the people of Pennsylvania<sup>70</sup> would represent a significant advancement in the process of consistently selecting a qualified judiciary. Though the objection has been raised that the abolition of partisan, competitive elections is undemocratic and will not remedy the evils of the present method,<sup>71</sup> support for merit plans has been firmly established in the many states which have adopted some form of it and in those states which have given earnest consideration to a merit plan.

The Pennsylvania solution does not, however, represent the ultimate level of development of the merit plan. To complete the evolutionary process and thereby arrive at the best possible formula, it will be necessary in the future for states adopting similar plans to cull from the multifarious experiences of the pioneer states the most successful features of their plans. They will be required to evaluate the story of merit selection, from the time it was only a gleam in the eyes of men like Roscoe Pound, Albert Kales and Herbert Harley, to trace its history down to its approval by the American Bar Association in 1937, its incorporation into the National Municipal League's Model State Constitution<sup>72</sup> and the American Bar Association's Model Judicial Article,<sup>73</sup> its adoption by the new Oklahoma judicial article approved in July of 1967,<sup>74</sup> and its incorporation in the revision of the Pennsylvania judiciary article.<sup>75</sup> Merit plan selection of judges is in its infancy.<sup>76</sup> Many other states will be coming along in the next few years and while it is not possible to foresee the future, some speculation on the probable evolution of the plan seems warranted.

It seems certain that although the commissions have wisely moved away from the all-judge format, they will not move entirely away and will continue to have some judicial representation. This makes sense for the obvious reason that, as the saying goes, "it takes one to know one." If you were selecting somebody to make a trip to the moon and

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70. See note 1, *supra*, and accompanying text.

71. Reference Manual No. 5, Part II § 5.2, 5.3.4, 7.3.4.

72. The National Municipal League published its first Model State Constitution in 1921. It was revised in 1928, 1933, 1944, 1948 and 1963. Copies of the Model State Constitution may be purchased from the National Municipal League in New York City.

73. 87 A.B.A. REP. 392-99 (1962); 45 J. AM. JUD. SOC'Y at 280-82 (1962).

74. OKLA. CONST. art. VII-B, adopted July 11, 1967, at a special election.

75. See note 1, *supra*, and accompanying text.

76. See note 8, *supra*.

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there was someone around who had already been to the moon and back, wouldn't he be a good person to have sitting in on those deliberations? Too, the trend against having the judge as chairman will continue. Laymen tend to put a halo on a judge, and lawyers tend to wonder how he is going to feel about them when that case comes around next week. There exists some concern that in some instances (no doubt a minority), depending on individual personalities, a judge chairman might unduly dominate the commission.

The trend toward more and more lay membership will probably continue. I think the lawyer viewpoint is important, just as is the judicial viewpoint, and lawyers and judges are useful commission members for those reasons. An all-lawyer commission, however, would tend to exaggerate the purely technical skills of a good lawyer, and the broader viewpoint of the layman on non-legal considerations of general intelligence, education, personal integrity and other human qualities is needed. A lawyer majority, or a lawyer-judge majority on the commission gives critics an opportunity to charge that the whole system is a scheme to contrive organized bar domination of the bench. For these and other reasons, I believe that an all-layman commission will make its appearance, and it will make good selections, even on the technical points, because it will know how to get good legal advice. Businessmen know how to get good legal counsel for their businesses and they even change counsel on occasion. It might be an advantage to a commission not to be limited to one, two or three lawyers chosen for them by someone else.

Disappearance of the confirmation by the senate (or other body) device may be expected. It has already proved itself to offer no significant assistance in the selection process and what significance it has is 95 per cent political. As an element of the judicial selection process it has degenerated in almost all instances to a meaningless rubber stamp,<sup>77</sup> and it will disappear as the eyes disappeared from the fish swimming in the perpetual darkness of Mammoth Cave. That this is already occurring can be seen by looking at Pennsylvania. Under its proposed merit plan the appointment by the governor constitutes the final step.

The device of tenure by non-competitive election also will pass out of the picture. A review of the discussion concerning it in Kales' *Unpopular Government* book makes clear that it was originally offered

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77. The current rule in Pennsylvania is that if the senate is in session, the governor must submit his selection to that body for approval.



only to quiet the fears of those devotees of the elective method who might be willing to acknowledge that a commission of knowledgeable people could do a better job than the voters in finding the right kind of judicial talent to begin with but were concerned that there would be no adequate way to get a judge who went wrong off the bench. One of the saving features of the elective process is that, in theory at least, if the voters make a mistake and pick the wrong man they can correct the mistake and dismiss him at the end of his term. There was apprehension that even though a commission might make fewer mistakes it could still make them, and that security of tenure would itself encourage the judges to let themselves go and become unreasonable and difficult, and there would be nothing that anybody could do about it.

Since Kales' time, however, a new institution has appeared on the horizon to handle problems of judicial discipline and removal far better than the voters possibly could. I say "new" but actually this too is to be found in the Kales blueprint—the judicial council which he would have had not only to nominate but also to exercise disciplinary powers over the judges under it.<sup>78</sup> Its first actual embodiment was a "Court on the Judiciary" established by constitutional amendment in New York in 1948, with judges representing all levels of the state judiciary to hear and decide charges against judges.<sup>79</sup> In 1960 California established a "Commission on Judicial Qualifications," composed of judges, lawyers and laymen, for a similar purpose.<sup>80</sup> Courts or commissions based on one or the other of these patterns, with variations, of course, have been set up in Oklahoma, Illinois, Texas, Florida, Nebraska, New Mexico, Colorado, Idaho, Louisiana and Maryland,<sup>81</sup> and something of the kind is included as a component or an adjunct, of most of the merit plans now on the drawing boards in other states.

I do not say that there is not still a valid justification for giving the voters a last veto against a present-day Jeffreys who might conduct his own twentieth century "bloody assizes," but I do think that the quali-

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78. KALES, 249.

79. N.Y. CONST. art. VI, §§ 22-24.

80. CAL. CONST. art. VI, § 8, 18; Burke, *Judicial Discipline and Removal—The California Story*, 48 J. AM. JUD. SOC'Y at 167-172 (1965).

81. Oklahoma, OKLA. CONST. art. VII-A; Illinois, ILL. CONST. art. VI, § 18; Texas, TEX. CONST. art. V, § 1-a; Florida, FLA. CONST. art. V, § 13 B; Nebraska, NEB. CONST. art. V, §§ 28-31; New Mexico, N.M. CONST. art. VI, § 32; Colorado, COLO. CONST. art. VI, § 23; Maryland, MD. CONST. art. IV, §§ 4A, 4B. Commissions were approved on November 5, 1968, by the voters in four states, Idaho, Louisiana, Oregon and Utah, the latter one to come into existence only upon enactment of implementing legislation. *Voters Approve Judicial, Constitutional Reforms*, 52 JUD. 182 (1968).

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fications commission is a much better answer to that problem, and that the chief role of the non-competitive elective tenure in the future will be a reassurance to people who are steeped in the elective tradition that in adopting a merit plan they are not actually giving up everything but are still retaining an essential part of the elective system, and just getting some needed help in the hard part. This is bound to be a diminishing role as more and more states switch to initial selection by nomination and appointment, and I think the ultimate pattern of merit selection and tenure probably will turn out to be nomination by a commission and appointment for life or good behavior, the issue of good behavior being determined by a California-type Judicial Qualifications Commission.<sup>82</sup> There have been suggestions, and the plans enacted in Idaho<sup>83</sup> and pending in Indiana<sup>84</sup> are so drafted, that a single commission may serve both the nominating and the disciplinary function. I am wary of that, because I can see the possibility, even though remote, that the commission might some day decide to oust A in order to turn around and install B in his place. I do not think that ought to be possible; the two functions should be in separate hands.

A better key to true non-partisanship will be found. The ideal answer is for everyone involved to put politics completely out of mind with respect to both commission membership and judicial appointments. Among human beings that is an unattainable ideal. The most practical way to neutralize opposing forces is to balance them, and that is the theory behind bipartisanship in commission memberships. To make selections on a party basis for a position that is supposed to be non-partisan is a contradiction, however, and one that has mystified our friends across the sea.<sup>85</sup> An entirely new and better approach is needed. That approach probably will be by way of perfecting our means of discovering and evaluating the affirmative traits which make for excellence in judicial performance, and, having assured ourselves of getting them, indulging in the luxury of ignoring irrelevant considerations like party affiliation to the point of not caring what the judge's political leanings may have been prior to appointment, or how many of which party are now on the bench.

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82. This viewpoint was persuasively presented a few years ago by Nelson, *Variations on the Theme—Selection and Tenure of Judges*, 36 SO. CAL. L. REV. 4-54 (1962).

83. Idaho Sess. Law 1967, ch. 67.

84. Laws of State of Indiana (1967), ch. 375; Report of Indiana, Judicial Study Commission, p. 143 (1966). See also, note 8, *supra*.

85. See, editorial, "How to Lose a Ball Game," 45 J. AM. JUD. Soc'y 304, 305 (1962); The Nebraska Institute for Judicial Nominating Commissioners, 51 JUD. 351 (1968).

It is unfortunately true that there is no magic in even a well selected and well intentioned commission. The commission members are sure to approach their job with doubt and uncertainty and they need guidance and help if they are to do their job well. They need a means to avoid making the same mistakes that their predecessors have made and to profit from their constructive experience.

In the summer of 1967 the American Judicature Society in cooperation with the University of Denver conducted a one-day institute for members of the Colorado nominating commissions. Experienced members of commissions in Missouri and other states were brought in for lectures and panel discussions, and a record was made of the entire proceedings. Another similar event was held in Lincoln, Nebraska, in January of this year for the Nebraska commission members.<sup>86</sup> I can predict that as more and more states adopt merit selection there will be more and more of these institutes, supplemented by a growing literature arising out of them, and, I hope, by some careful research into judicial qualifications and characteristics and how to identify and evaluate them.<sup>87</sup>

In my opinion the concept of *ex officio* membership on nominating commissions, as in the Utah juvenile court plan, will gain in favor. It is impossible to stack or control this commission. Its members are persons of ability and distinction, chosen for their main jobs because of preeminence in their respective fields. Their function in the making of judicial nominations is collateral to their primary field; they may be expected to bring to the commission's deliberations informed and intelligent judgment based on their desire to provide for good judicial service to the area that is their primary concern. Surely many other states will be persuaded of the wisdom of a nominating commission so constituted.

Finally, I predict that by the end of the decade of the '70's merit selection and tenure will have taken over to the point that the general level of the judiciary, in terms of intelligence, integrity, legal ability and quality of performance will be such that problems of judicial personnel will have receded into the background and will have been supplanted by who knows what new crises that now lie below the horizon.

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86. *First Workshop for Nominating Commissions*, 51 JUD. 62-64 (1967).

87. For information articles exploring this area see M. Rosenberg, *The Qualities of Justices—Are They Strainable?*, 44 TEXAS L. REV. 1063-1080 (1966), Mott, *Measurement of Judicial Personnel*, 23 N.Y.U.L.Q. REV. 262-277 (1948).

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