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SELECTION AND TENURE OF MARYLAND JUDGES: AN EXPLANATION OF A PROPOSAL

By ROBERT J. MARTINEAU*

At its 68th annual meeting to be held in June, 1963, the Maryland State Bar Association will consider a draft of a Constitutional Amendment which if adopted will establish an alternative procedure to that now provided for the selection and retention of the judges of the state judicial system. The proposed Constitutional Amendment was drafted and its adoption is recommended by a special Committee on Judicial Selection of the Maryland State Bar Association, of which Eli Frank, Jr. of the Baltimore Bar is the Chairman.[1]

The principal features of the proposed Amendment are, in brief, these:

(1) That the Governor appoint from a list of nominees submitted by a judicial nominating commission a person to serve as judge for a limited term;

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[1] The other members of the Committee are G. C. A. Anderson of Baltimore, David E. Betts of Rockville, Chief Judge John B. Gray, Jr., of Prince Frederick, Walter M. Jenifer of Towson, William L. Marbury of Baltimore, Ridgely P. Melvin, Jr., of Annapolis, Charles Awdry Thompson of Cambridge, and the author as Secretary. While it is attempted here to state accurately the reasons behind the Committee's drafting of the Constitutional Amendment, this article must be considered only as the work of a member of the Committee and not that of the Committee itself.

The Committee was appointed by the President of the Maryland State Bar Association pursuant to a resolution passed at the 1962 annual meeting of that Association. The Committee spent several months studying both the operation of the present system of selection and tenure of judges in Maryland and the systems in existence in other states. The Committee in its interim report to the 1963 mid-winter meeting of the Maryland State Bar Association presented its tentative recommendations as to the method of selection and retention of judges which it considered best suited to Maryland. Subsequent to the mid-winter meeting, the Committee has undertaken to attend meetings of local bar associations throughout the State in order to explain its plan and to receive from the members of these associations the benefit of their suggestions and criticisms with respect to its proposals. The Committee then drafted a Constitutional Amendment which would put into effect in Maryland that system which it believes would result in the selection and retention of those best qualified to hold judicial office — a system which combines a judicial nominating commission procedure for the initial appointment of judges and a non-competitive election for the retention of judges (hereinafter referred to as the judicial nominating commission system).

(2) That at the general election preceding the end of that term the appointee, running "on his record" and without an opposing candidate, be either elected to a full term or be rejected and retired;

(3) That initially only appointments and elections to the Court of Appeals be under this Amendment, but that it may be made applicable to other courts by Act of the Assembly or upon referendum vote in the jurisdiction affected.

The proposed Amendment contains, among other things, a number of detailed provisions relating to the representation of the bar and of the public on judicial nominating commissions.

It is considered desirable that prior to the consideration of the proposed Constitutional Amendment by the Maryland State Bar Association the members of the bench and bar of Maryland and, in particular, the members of the Association should have available a detailed explanation of the purpose and meaning of the proposed Amendment. The purpose of this article is primarily to explain the historical background and the terms and provisions of the proposed Constitutional Amendment rather than to present a brief or argument for its adoption. It is hoped, however, that the better and more widely the proposals are known and understood, the more they will commend themselves to favorable consideration.[2]

[2] Although a discussion of the merits of the various arguments for and against the judicial nominating commission system which the Committee proposes be adopted in Maryland is beyond the scope of this article, it might be a convenience here to list the usual arguments made for and against this type of judicial selection system. The arguments most often heard in support of such a system are the following: (1) The purpose of a judicial selection process should be to select and retain in office those persons best qualified to hold such office; (2) Neither the traditional executive appointment system nor the partisan or non-partisan elective system is designed to achieve this result; (3) The sole purpose of the judicial nominating commission system is to select and retain the best judges; (4) Under other systems qualified judges are selected not as a result of such systems but rather in spite of them; (5) Although political activity should not be a bar to holding judicial office it should not be a prerequisite for it; (6) The people's right to select their judges is not taken away by the judicial nominating commission system because under other systems the people are not able to exercise such a right; (7) The purpose of political competition — to offer the people opposing political philosophies and programs — is inconsistent with the judicial process which is concerned with the impartial administration of justice and is not concerned with political philosophies and programs.

Those opposing the judicial nominating commission system rely on the following arguments: (1) Such a system restricts the right of the people to select their own judges; (2) A lawyer has the right to put his name before the people for the office of judge; (3) Such a system puts the selection of judges solely into the hands of lawyers and bar associations;

History of Judicial Reform

Judicial reform, as was stated by Roscoe Pound in his famous speech "The Causes of Popular Dissatisfaction with the Administration of Justice," is as old as law. As he put it "discontent has an ancient and unbroken pedigree."[3] For example, among the causes of the American Revolution was a dissatisfaction with the administration of justice in the Colonies.[4]

All of the constitutions of the original thirteen states and the Federal Constitution, however, retained a system for selection and tenure of judges similar to the English system — appointment by the executive or legislature during good behavior. Some states, including Maryland, added a requirement that the appointee had to be approved by the Council. As Jacksonian democracy began to influence state constitutions in the middle of the Nineteenth Century, new states coming into the Union usually provided for partisan election of judges who held office for a short term, and many of the older states amended their constitutions to provide for a similar scheme.[5] These changes reflected the attitude of the era which held that any man (or at least any lawyer) was qualified to be a judge, that the people's right to select their judges should not be encumbered in any way, and that the terms of judges should be short so that the judges would be more responsive to the will of the people. Some states found this system to be inappropriate for the judicial process and reverted back to

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(4) Once a person is appointed a judge it is impossible to defeat him in a non-competitive election even though he may be unqualified; (5) The present system has proved satisfactory so there is no need to change it. The arguments on both sides have honorable antecedents. See for example, Perlman, DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867, 304-26 (1923) and DEBATES, MARYLAND REFORM CONVENTION, 459-550 (1851).

[3] This speech, delivered at the 1906 annual convention of the American Bar Association, and generally regarded as the starting point for organized activity looking to the improvement of the administration of justice, was reprinted in 46 J. Am. Jud. Soc'y 54, (1962). See also Winters, *The Founding of the Society, Id.*, 45.

[4] Among the acts of the King which were listed in the Declaration of Independence as justifying the breaking away of the Colonies from the mother country were the following: "He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers. He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries. * * * For depriving us in many cases of the benefit of trial by jury: For transporting us beyond seas to be tried for pretended offences: . . ."

[5] The most complete review of judicial selection and tenure in the United States is found in Haynes, THE SELECTION AND TENURE OF JUDGES (1944). See also Vanderbilt, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION (1949). Both works were published by The National Conference of Judicial Councils.

some form of executive appointment for longer terms. Most, however, have retained the basic features of the elective system but with some modifications such as non-partisan elections, cross-filing in primaries, filling of temporary vacancies by the executive and lengthening of judicial terms.

Maryland, in the Constitution of 1776, vested the power of appointing judges in the Governor and provided for judges to hold office during good behavior.[6] The appointments were, however, subject to the confirmation of the Council. In 1837, when the Council was abolished, judicial appointments and other executive appointments were made subject to the approval of the Senate.

Maryland withstood the pressures of "Popularism" until 1851 when the system was completely changed and judges were elected for a term of ten years in the same manner as any other elected state official. The Governor was not given the power to fill any vacancies even on a temporary basis. In the Constitution of 1864 the Governor was given the power to fill judicial vacancies which occurred other than by the expiration of the term of a judge. The term was extended from ten to fifteen years. Any judicial appointment made by the Governor, however, was again subject to confirmation by the Senate.

In the Constitution of 1867, which (with many amendments) is the constitution still in effect in Maryland, the Governor was given power to fill most judicial vacancies, including those arising through the expiration of the elective term of a judge.[7] This authority was extended to all judicial vacancies, no matter how arising, by amendments adopted in 1881 and 1944.[8] In 1941 party designations were eliminated by statute in judicial general elections. Judicial candidates are permitted to cross-file in party primaries thus enabling a judicial candidate to appear on the ballot of the two major political parties, a practice permitted by statute since 1943, but limited to judicial candidates. These

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[6] Provisions for appointments for terms of good behavior were quite common immediately after the Revolution. At the present time only New Hampshire, Massachusetts, New Jersey (after an initial appointment of seven years) and the Federal Constitution grant such terms.

[7] See Smith v. Higinbothom, 187 Md. 115, 48 A. 2d 754 (1946).

[8] The authority is likewise usually placed in the Governor when additional courts are created. Article IV, Section 41A (People's Court of Baltimore City); Section 41C (Municipal Court of Baltimore City). The Legislature need not so provide for People's Courts of the counties. Article IV, Section 41B. On occasions when additional judgeships are created by an amendment to the Constitution the Legislature often inserts a provision in the Amendment requiring the newly created vacancy to be filled initially by election.

provisions reduced to some extent the effect of a judicial candidate's membership in a particular political party.[9]

Under the present system in Maryland when a judicial vacancy occurs the Governor appoints someone to fill the vacancy until the first general election after the appointee has served one year. In the primary for that election the judge so appointed may or may not run for a full elective term and other candidates may run for nomination to run for a full elective term. Since a judge running for election was restrained somewhat by his office in campaigning for election, and since to many lawyers it seemed inappropriate for a judge to engage in partisan politics, the leaders of the Bar soon conceived the "sitting judge" principle under which the support of the organized Bar is thrown behind a judge, (including one who has only recently been appointed by the Governor and who has never been elected to such office) who is seeking to remain in office and who has at least demonstrated no incapacity to hold judicial office.[10] There have been only a few occasions when the "sitting judge" principle has not been effective to elect those judges who had been appointed by the Governor.[11]

For many years after the adoption of the Constitution of 1867 the Governor relied only upon the counsel of his own conscience and his personal and political advisors in filling judicial vacancies. The Bar Association of Baltimore City was the first bar association to recommend to the Governor the names of lawyers qualified to be appointed to a judicial vacancy. In 1940 Governor Herbert R. O'Conor requested

[9] Such cross-filing is, of course, most important where a large majority of the voters register in one political party since in such cases a judicial candidate who is a member of the minority party or an independent may be nominated by the majority party as well as by his own and may be unopposed in the general election.

[10] The justification for this "principle" is that a judge who has served on the bench is entitled to be elected because he has demonstrated his capacity to be a judge. This "principle" has been applied to virtually all appointed judges even though many have served in office only a very short time before the election (this is particularly true as to the primary election), and even though the ability demonstrated by the judge may leave much to be desired. The reason for this is that even though in practice the "sitting judge" principle may have some defects, it is far superior to a wide open political campaign for the office of judge in which a sitting judge must engage in the same type of political activities as his opponent and, thus, become indebted to political factions and must risk defeat on the basis of politics, not competence. Some such protection is required to induce qualified lawyers to accept an appointment under the present system.

[11] One of these occasions was in 1882 which, however, involved a determined effort by the leaders of the Bar to defeat certain sitting judges who had demonstrated their incapacity to sit on the bench. This story is related in Johnson, et al, The Sunpapers of Baltimore, Ch. 7 (1937) and is referred to in Smith v. Higinbothom, 187 Md. 115, 48 A. 2d 754 (1946).

the Maryland State Bar Association to establish a procedure whereby it would recommend to the Governor the names of lawyers who were qualified to be appointed to fill a judicial vacancy which had arisen. A committee of the Association headed by Charles Markell, later Chief Judge of the Court of Appeals, was appointed to devise such a procedure. This committee formulated such a system which was approved by the Association in 1941 and which is still in effect.[12]

In spite of minor improvements such as cross-filing, bar association recommendations and the "sitting judge" principle, there has been over the years a substantial amount of activity both within and without the Maryland State Bar Association for a major revision of Maryland's scheme of appointing and electing its judges. Among the first proposals was that by Judge Morris A. Soper who, in 1920 as President of the Maryland State Bar Association, called for a complete revision of the Maryland process of election. His proposals as to the selection and tenure of judges were based upon the plan of Albert N. Kales, discussed herein, and are quite similar to the ideas incorporated in the Constitutional Amendment proposed by the Committee on Judicial Selection.[13] Most recently, in 1956, a special committee of the Maryland State Bar Association was appointed to consider this same problem. This committee presented a plan embodying a major change in the

[12] Subsequent to this many of the local bar associations have also established committees on judicial vacancies which make recommendations for such vacancies in their respective jurisdictions. This often results in several different lists being submitted to the Governor by various bar associations. With such varied lists to choose from, a Governor is usually able to find on at least one of these lists the name of a politically acceptable lawyer.

[13] 25 Transactions, Md. St. Bar Assoc. 3, 24-27 (1920). Thereafter there were reports from several commissions: the Judiciary Commission appointed in 1922 by Governor Albert C. Ritchie of which Charles McHenry Howard was chairman and which filed its report in 1924; a committee of the Baltimore City Bar Association of which Joseph C. France was chairman whose recommendations are reported in 44 Transactions, Md. St. Bar Assoc. 41 (1939) and 45 Transactions, Md. St. Bar Assoc. 171 (1940); Committee on Judicial Nominations and Elections of the Maryland State Bar Association whose reports and discussions thereon are in 44 Transactions, Md. St. Bar Assoc. 41 (1939) and 45 Transactions, Md. St. Bar Assoc. 60, 171 (1940); the Commission On the Judiciary Article of the Maryland Constitution (The Bond Commission) appointed in 1941 by Governor Herbert R. O'Conor, whose reports are published in 48 Transactions, Md. St. Bar Assoc. 3, 15 (1943); and the Commission to Study the Judiciary of Maryland (The Burke Commission) appointed by Governor Theodore R. McKeldin whose report filed in 1953 advocated no immediate changes in the method of selecting judges but which contains an appendix prepared by the Reporter of the Commission, Melvin J. Sykes, which is an excellent review of judicial selection in Maryland and the various proposals concerning judicial selection in the various states.

method of appointing judges but only minor changes in the method of electing judges. The recommendations of that committee were rejected at the 1957 annual meeting of the Maryland State Bar Association.[14]

The problem of judicial selection and tenure was again brought to the attention of the Maryland State Bar Association in a speech to its 1962 annual meeting by Chief Judge Emory Niles. In this speech Judge Niles, who was retiring as President of the Maryland State Bar Association, called for the adoption in Maryland of a method of judicial selection embodying two principles: "1. The limitation of judicial appointments to a list presented to the Governor by a non-partisan nominating commission. 2. The adoption of a scheme whereby a judge runs against his record and not against anybody who wants the job."[15] As a result of this speech, the Association adopted a resolution directing its President to appoint a special committee to study the proposal made by Judge Niles. The Constitutional Amendment to be discussed herein is the result of that committee's deliberations.

The Judicial Nominating Commission System

Judge Niles' proposals were not, of course, original, and had been previously suggested to the Association on several occasions.[16] The judicial nominating commission — non-competitive election system for selection and tenure of judges had, indirectly, its origin in the 1906 speech of Dean Pound to the American Bar Association because this speech was one of the factors which gave rise to the formation of the American Judicature Society in 1913.[17] At the first

[14] The details of that plan are set forth in the final report of the committee found in 62 Transactions, Md. St. Bar Assoc. 235-241 (1957). Under the plan of that committee, which would be applicable in the first instance only to the Court of Appeals and to Baltimore City, a commission of three lawyers and three laymen and the Chief Judge of the Court of Appeals as chairman would nominate three lawyers for a judicial vacancy, one of whom the Governor would appoint to the vacancy. The person so appointed would hold office until the first general election after he had served one year in office. At such general election the judge so appointed would be eligible to have his name on the ballot without party designation. Any other person desiring to run for such office could have his name placed on the ballot by petitions signed by not less than one percent of the total number of registered voters in the preceding general election. Included in the one percent had to be at least ten percent of the lawyers residing in the particular jurisdiction. If two or more judges were to be elected, a candidate whose name appeared on the ballot by petition had to designate the judge against whom he was running. Judicial primary elections would be eliminated under this plan.

[15] 67 Transactions, Md. St. Bar Assoc. 379, 381 (1962).

[16] *Supra*, ns. 13, 14.

[17] *Supra*, n. 3.

meeting of that organization its seven principal areas of concern were delineated, the first of which was judicial selection and tenure. One of the first acts of the Society was to appoint Professor Albert Kales of the Northwestern University Law School to draft a model state judicial article. The first draft of this article was presented in 1914 and provided for an elected Chief Justice to appoint other judges who were to be subject to popular vote at regular intervals thereafter without competition. The National Municipal League added a requirement that the Chief Justice choose from nominees of an independent commission. These proposals did not gain substantial recognition until 1937 when the American Bar Association adopted a resolution recommending as the most acceptable substitute for direct election of judges a plan which included (a) appointment of judges by the executive from a list drawn up by an independent nominating commission and (b) submitting the question of whether such judges should be retained in office for additional terms to be voted on periodically.[18]

Missouri became the first state to adopt a constitutional amendment embodying these two principles when in 1940 the voters of that State approved an amendment to its Constitution establishing a judicial nominating commission system for its Supreme Court and Courts of Appeal and for the two largest cities in Missouri, St. Louis and Kansas City.[19] Efforts to extend the application of this system to other jurisdictions in Missouri have been stymied by the refusal of the Missouri Legislature to provide for a method of submitting the question to the voters of a judicial district.

Since Missouri's initial step, other states have adopted similar systems. In 1950 Alabama provided for nomination by a commission for vacancies on the trial court of the

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[18] Under a system adopted in 1934 in California, all subsequent vacancies in its appellate courts are filled by initial appointment by the governor, subject however, to approval by a qualification commission, with approved appointees being required to run in non-competitive elections for each successive term. Criticism for this variation of the judicial nominating commission system was recited in Smith v. Higinbothom, 187 Md. 115, 122, 48 A. 2d 754 (1946) citing 28 J. Am. Jud. Soc'y 91 (1944). This criticism was based on the reluctance of the California commission to reject a nominee of the governor.

[19] The most complete account of Missouri's struggle to adopt such a system and to retain it is contained in Peltason, *The Missouri Plan for the Selection of Judges*, 20 Univ. of Mo. Studies, No. 2 (1945). A shorter but more readily available description of this struggle is found in Bundschu, *The Missouri Non-Partisan Court Plan — Selection and Tenure of Judges*, 16 U. of Kan. C. L. Rev. 55 (1947-48).

City of Birmingham but did not provide for a non-competitive election of such judges. In 1958 the plan was adopted by the voters of Kansas for its Supreme Court. In 1959 Alaska adopted in its initial constitution a similar system for all of its trial and appellate courts.[20] In 1962 both Iowa and Nebraska adopted a judicial nominating commission procedure for all the trial and appellate courts in those states. Also in 1962 Illinois amended its constitution to enable judges to be retained in office by a majority vote at a non-competitive election. No change was made, however, in its system of judicial selection, which is by partisan election. In 1963 the legislatures of several additional states will be asked to consider the judicial nominating commission system for their respective states. There are movements in almost one-half of the remaining states seeking the adoption of such a system in those states.[21]

In 1959, under the auspices of the American Bar Association, the American Judicature Society and the Institute of Judicial Administration, a National Conference on Judicial Selection and Court Administration was held in Chicago, attended by over a hundred laymen, lawyers, judges and law school professors from all over the United States. As to the proper system of the selection of judges, this conference approved the judicial nominating commission system as the best plan yet devised.[22]

In 1962 the American Bar Association adopted a resolution recommending to the states a model judicial article

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[20] Alaska has provided for only one judicial nominating commission for all of its courts, apparently because it was thought that one such commission was adequate where there were so few people, and, consequently, so few lawyers and judges.

[21] 46 J. Am. Jud. Soc'y 123 (1962).

[22] The consensus of the conference stated: "The objective of each method of selection should be to obtain judges free of political bias and possessed of qualities that will lead to the highest performance of their judicial duties.

"It is indispensable to the proper functioning of the judicial system that men who are to be elevated to the bench be selected solely on merit, on the basis of their qualifications for judicial office. In the process of their selection as well as in their work and tenure they must be free of all collateral influence and partisan political pressures." The consensus went on to recommend: "The American Bar Association plan affords the means of avoiding the weaknesses in other existing methods, while retaining their desirable features. It provides for the filling of judicial vacancies by appointment by the governor from nominations submitted by a non-partisan commission composed of lawyers, judges and laymen. Tenure of judges so appointed is subject only to vote of the people at a non-competitive election. This relieves the judge from the necessity of campaigning for office against opposing candidates, but still requires him to answer to the electorate. These two distinctive features tend to assure selection and retention of the best qualified judges." 45 J. Am. Jud. Soc'y 1, 9-10 (1962).

for state constitutions prepared by its Section on Judicial Administration which also embodied these same basic features.

Proposed Constitutional Amendment

The Committee on Judicial Selection of the Maryland State Bar Association upon its appointment first considered whether there was, in fact, any need to change the present system in Maryland, as was suggested by Judge Niles, or whether the present system had worked sufficiently well so that there was no reason to change. The latter position is advocated by some persons and was the attitude partly responsible for the rejection of the recommendations of the special Maryland State Bar Association committee in 1957. The Committee also considered whether any minor improvements in the present system would be sufficient to cure any alleged defects in that system. The Committee, after careful consideration, unanimously came to the conclusion that the present system in Maryland was in need of a major revision and that minor alterations in that system would not be sufficient to cure or protect against those evils which were possible under it. After considering all possible methods of judicial selection and tenure, the Committee came to the tentative conclusion that a judicial nominating commission — non-competitive election system would be best for Maryland. Before finally adopting this conclusion, however, the Committee delegated one of its members to spend several days in Missouri discussing the operation of the Missouri system with persons of as many different callings and backgrounds as it was possible to arrange. The report filed with the Committee convinced the Committee that it should recommend for adoption in Maryland a judicial nominating commission — non-competitive election system adapted to Maryland's needs.

The Constitutional Amendment as drafted by the Committee contemplates the addition to the Judiciary Article of the Maryland Constitution, Article IV, of a new Part VIII entitled "Judicial Nominating Commissions" consisting of eleven sections. The first section, which will be Section 46 of Article IV, provides that on the occurrence of any vacancy on the Court of Appeals or on any other court made subject to the provisions of the Amendment, the judicial nominating commission for that court will nominate three persons (two in smaller jurisdictions) for the vacancy, one of whom shall be appointed by the Governor.[23] The

[23] These persons must, of course, have the qualifications otherwise established in the Constitution for the judges of the various courts. Md. Constitution, Article IV, §§ 2, 21, 40, 41A, 41B, 41C.

language used in the Amendment listing the various ways in which a vacancy can arise, i.e., death, resignation, expiration of term, etc., is the same as that used in Section 5 of Article IV which establishes the present procedure for the filling of most judicial vacancies. The same language was used so that there can be no dispute as to the application of the two sections. It was thought that if some simpler language were used, such as "upon the occurrence of any vacancy through expiration of a term or otherwise," an argument could be made that there might be some vacancy to which Section 5 would apply that Section 46 would not. The number of nominees is fixed at three for most jurisdictions because of the conviction of the Committee that a list of nominees which is either too large or too small could create difficult problems. Such a number allows the Governor several choices without making the list so large as to make it almost meaningless, and it is the number usually provided for in other state constitutions and has apparently worked well.

It is next provided that the nominating commission must make the nominations for a vacancy not more than thirty days prior to, nor more than sixty days after, the occurrence of any vacancy. It was considered that where it is known in advance that a vacancy will occur, such as upon the expiration of the term of a judge who does not seek re-election, the length of time for which lawyers could be nominees for the vacancy should be limited. Such a status would have an effect on a lawyer's practice and it might perhaps be somewhat embarrassing for the retiring judge to have his successor or nominee as his successor appearing before him in court. The limitation also shortens the time in which political pressures can be brought to bear upon the Governor to appoint a particular nominee. The sixty day limitation after the occurrence of the vacancy gives the nominating commission sufficient time to make nominations for a vacancy which occurs unexpectedly, but prevents a vacancy from remaining unfilled for an unduly long period of time. The last sentence in this section provides that if the Governor fails to make a nomination within thirty days after receiving notification of the nominations, the Chief Judge of the Court of Appeals shall make the appointment. The purpose of the provision is to avoid an unhappy situation which developed in Missouri when the Governor refused to appoint from the list of nominees submitted by the nominating commission and required the commission to nominate three other persons more to his liking. It is not expected that any chief judge will ever

have the opportunity to exercise this power since it is most unlikely that any Governor will refuse to make an appointment knowing that if he does not someone else will.

Section 47 outlines the procedure whereby the General Assembly or the voters of a county, judicial circuit or Baltimore City may elect to have the nominating commission procedure made applicable to their respective jurisdictions. The Committee spent a great deal of time studying and discussing the question of the jurisdictions to which the Amendment should be made applicable. Judge Niles in his speech advocated that the plan should be made applicable to the Court of Appeals and to the City of Baltimore and the special committee of the Maryland State Bar Association in 1957 also included the Court of Appeals and the City of Baltimore in the original application of its plan. The Committee rejected the idea of making any court or jurisdiction other than the Court of Appeals subject to the Amendment in the first instance, even though the Committee was strongly of the opinion that the Amendment should be made applicable to the courts of Baltimore City and of the counties surrounding Baltimore City and the District of Columbia. There were two reasons for this apparent inconsistency. The first is that the Committee thought that the application of the Amendment to any particular jurisdiction should be decided by the voters of that jurisdiction rather than by the voters in the rest of the State who would be expected to have little or no connection with the courts of that jurisdiction.[24] The second, a more practical one, was that the Committee was of the opinion the Amendment would be more acceptable if it was primarily a local option measure in the first instance.

It is also provided that the Amendment may from time to time be made applicable to some or all of the courts in a particular jurisdiction. The Committee did not think it wise to limit the applicability of the Amendment to only the courts of general jurisdiction and to prohibit the inclusion of courts of limited jurisdiction such as the Municipal Court of Baltimore City, People's Courts and even Orphans' Courts. With the increasing number of such courts throughout the State and the almost constant efforts to enlarge the

[24] The Committee had before it the recent experience of the deletion from Section 41A of Article IV of the provision which called for non-competitive election of judges of the People's Court of Baltimore City. The Amendment changing the non-competitive election to a partisan political election did not carry Baltimore City but the votes in favor of it in the remainder of the State were sufficient to adopt it. The interest of a voter in such counties as Allegany or Wicomico in the method whereby Baltimore City re-elects its People's Court judges is at best limited.

jurisdiction of these courts, it was thought advisable to permit maximum flexibility in the application of the Amendment. It was also the purpose of the Committee by this section to permit a jurisdiction which at one time adopts the Amendment for some of its courts to include other courts within the Amendment at a later time, if the voters of that jurisdiction are satisfied with its effect upon the selection of judges for those courts under the Amendment. A prohibition against a jurisdiction or court once subject to the Amendment from being withdrawn from its application except by another constitutional amendment is also included. It was felt that to permit such a withdrawal by the same procedure established for the application of the Amendment would only enable a political machine at an election which incites little interest among the voters to bring back the old system of selecting judges and that this would defeat the purpose of the Amendment. In addition, if such withdrawal were permitted, judges appointed when the Amendment was effective could possibly continue to be subject to non-competitive election for retention in office and, thus, judges of the same court could be subject to re-election under different procedures.[25]

The Amendment may be made applicable to the courts of Baltimore City or of any county in the third, fourth, fifth, sixth and seventh judicial circuits or to the Circuit Court for the first or second judicial circuits.[26] The question of whether the courts of a jurisdiction are to be subject to the Amendment can be decided by the General Assembly or by the voters of the particular jurisdiction. This question can be placed on the ballot at a general election either by the General Assembly or by the use of the initiative petition such as is provided for submitting to the voters the issue of whether a county should adopt home rule.[27] The difficulties which have arisen in other states because of the reluctance of legislatures to permit local voters to vote on this question make the latter procedure necessary. This is particularly true where, as here, the Amendment will in the first instance be applicable only to the Court of Appeals.

The next section of the Amendment outlines the procedure for the non-competitive election of judges of courts

[25] Such is now the present unhealthy situation on the People's Court of Baltimore City.

[26] It is not possible to have counties in the first and second judicial circuits adopt the Amendment for those counties because each county in the circuit does not elect its own judge. In the third, fourth, fifth, sixth and seventh judicial circuits each county has at least one judge.

[27] Md. Constitution, Article XI-A, § 1.

subject to the Amendment. The first part of the section provides that a judge appointed pursuant to the Amendment shall hold office until the December 31st after the first general election held one year after his appointment. This provision is almost the same as is provided for judges appointed under the present Constitution.[28] At that general election, and at the general election next preceding the expiration of the judge's full elective term providing he certifies his candidacy for an additional term, the judge's name appears on the ballot without party designation and without opposition.[29] The sole question presented to the voters is whether the judge should be retained in office for an additional term. The exact language is not specified in the Amendment because the Committee did not think that it was necessary to include such detail. It is contemplated, however, that language basically the same as that included in the constitutions of other states will be used, namely, "Shall Judge ..... of the ..... Court be retained in office for a term of ..... years."

It is also provided in this section that judges appointed or elected to a court prior to the application of the Amendment to that court will be retained in office in the same manner as a judge appointed under the Amendment. It can be argued that if it is necessary to change the present method of selecting judges because the judges chosen under that system are not the best available, such judges should not be the beneficiaries of the protections afforded by the Amendment to judges chosen in accordance therewith.[30] The Committee, after much consideration, decided that it would be better to include such judges in the non-competitive election procedure for several reasons. Among them were: (a) the Amendment is directed at improving the selection process, not at removing judges selected under the present procedures; (b) if a judge is unqualified for office he can be defeated in a non-competitive election; and

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[28] Md. Constitution, Article IV, § 5.

[29] No similar requirement of certification is made for recently appointed judges who are being voted on for the first time. It is assumed that any judge accepting an appointment would not accept such an appointment if he did not plan to stand for a full term. If his personal circumstances prevent him from running he must resign.

[30] The one criticism which was heard in Missouri of its selection and retention plan was that it was too difficult to remove those judges whom some thought to be unqualified. In every instance the judge whom it was alleged was unqualified was one who had originally been elected to office prior to the adoption of the Missouri Plan in 1940.

(c) it would be best not to have judges on the same court subject to different procedures for re-election to office.[31]

The fifteen year term for the judges of the Court of Appeals, circuit courts and of the Supreme Bench of Baltimore City creates a problem where such a judge runs for re-election under the Amendment. Section 48 provides that a judge who desires to serve a second fifteen year term must run for re-election at the general election which next precedes the expiration of his original term. Because his term would have begun on the January 1st after the general election at which he was first elected, his term would expire on the December 31st which is almost 14 months after the general election at which he must run for re-election. When a judge is re-elected, it will be unimportant that for 14 months after his re-election he is still serving out his old term. However, when a judge is defeated for re-election, it seemed to the Committee most inappropriate to have the judge remain on the bench 14 months until his term expires. It is provided therefore, that if a judge is defeated his term ends upon the certification of his defeat and a vacancy is then created.[32]

One of the most difficult problems in any judicial election, whether it be competitive or non-competitive, is for the average voter to assess intelligently the judicial qualifications of a person whom he does not know and has never seen perform in court. Missouri and other states have adopted a procedure which to some extent cures this problem. Prior to any judicial election in these states a poll is taken by the appropriate bar association of all lawyers in the jurisdiction in which the judge is running for election on the question of whether the judge should be retained in office.[33] In Missouri if a judge receives a favorable vote of a majority of those voting on this question, the chairmen of the state and local Republican and Democratic parties jointly endorse the judge for re-election and committees similar to the committees for the election of the sitting judges in Maryland are then formed to support the candidacy of the judge. It would seem that some such procedure would be desirable in any state in which judges are re-elected in a non-competitive election and thus it is provided

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[31] *Supra*, n. 25.

[32] It may be that the better way to handle this problem is to have the terms for such judges fixed for an even number of years. The Committee was of the opinion, however, that proposals for changes in the term of judges should not be made until after the Amendment is in operation.

[33] This procedure is simpler in Missouri than it would be in Maryland because Missouri has an integrated bar.

in section 54 that the Court of Appeals shall prescribe rules for such polls.[34]

Section 49 establishes the Court of Appeals Nominating Commission which will be composed of 15 members including one lawyer and one layman from each of the five appellate judicial circuits outside of Baltimore City and two lawyers and two laymen from Baltimore City and the Chief Judge of the Court of Appeals who will be Chairman. This gives each appellate judicial circuit two members on the Commission for each judge of the Court of Appeals from that appellate judicial circuit. The terms of the members of the Commission will be seven years and will be staggered so that the terms of two members, one lawyer and one layman from different appellate judicial circuits, will expire each year.

At first glance it would appear that the membership of this commission is unduly large since nominating commissions in other states are usually limited to seven members. The Committee thought it important, however, to have both lawyer and lay representation from each appellate judicial circuit. To have had only one member from each of these circuits would mean that either the public or the bar of each of the circuits would be unrepresented on the Commission. This the Committee thought was undesirable, particularly for the circuit which has a vacancy on the Court of Appeals. In addition, members of the Court of Appeals Nominating Commission will be ex-officio members of local nominating commissions, as will be explained below, and thus there is a reason outside of the Commission itself for such a large membership. Further, the experience of the Maryland State Bar Association Committee on Judicial Appointments, which often sits with eleven or twelve members, has not indicated that this number is unwieldy.

The next section provides for the formation of local nominating commissions. For a county the commission will be comprised of two lawyers and two laymen from that county, the lawyer and layman on the Court of Appeals Nominating Commission from the appellate judicial circuit in which the county is located and the chairman, who will be the senior resident judge in that county, thus making a commission of seven members. In the event the county has no senior resident judge, for whatever reason,

[34] It has been proposed that one of the ways in which it could be made less difficult to defeat a judge in a non-competitive election is to raise the precentage of favorable votes in a bar poll which a judge must receive before the organized bar will support his bid for re-election. The adoption of such a requirement should be, perhaps, by rule of the Court of Appeals regulating bar polls.

the chairman of the commission will be the chief judge of the judicial circuit in which the county is located. A judicial circuit nominating commission is made up in the same way except that the local members need only be from the judicial circuit and not a particular county, and the chairman will always be the chief judge of that circuit.[35]

The organization of the county and judicial circuit commissions is such that the members of a commission from a particular county or judicial circuit will always have a majority vote on the commission, and thus the local representatives on the commission who are most concerned with judicial vacancies in that county or judicial circuit can determine the nominees of the commission. This local representation is increased on a county commission where the judge who is the chairman of the commission resides in that particular county. The judge who is chairman of a circuit commission must, of course, always reside in that circuit. The inclusion of members of the Court of Appeals Nominating Commission from the appellate judicial circuit in which the county or judicial circuit is located is designed to give representation on the commission to those interests which are legitimately concerned with the selection of judges in any local jurisdiction. A circuit court judge from a particular county can and often does sit in counties in his circuit other than his home county and thus the remainder of the circuit has a substantial interest in the quality of a circuit judge from a particular county. Likewise, a circuit judge can be assigned to sit in some other circuit of the State by the Chief Judge of the Court of Appeals or can be assigned to sit temporarily on the Court of Appeals itself. In addition, residents of one county or circuit are often involved in litigation in another county or circuit and such litigants have a very real interest in the ability of the judge who is to rule on their claims or defenses. The county and circuit commissions, therefore, represent primarily the interests of those most immediately concerned with the judge to be appointed but also represent those who have a similar but usually less immediate interest.

In addition to the two lay and lawyer members of the Court of Appeals Nominating Commission, the Baltimore City Nominating Commission is composed of one additional layman and one additional lawyer from Baltimore City and the Chief Judge of the Supreme Bench, who will be the

[35] The chief judge of a judicial circuit is not appointed by the Governor as such, but he is always the senior judge of that circuit. Md. Constitution, Article IV, § 21.

Chairman. It was thought desirable to include members over and above those who are members of the Court of Appeals Nominating Commission from Baltimore City. A commission so limited would consist of only five members and this would be too small in view of the number of judgeships in Baltimore City, particularly if either or both the Municipal Court and People's Court are included within the application of the Amendment.

The terms of members of local commissions other than those who are ex-officio members will be three years. This means that some members of local commissions will have terms of seven years (those who are members of such a commission by reason of their membership on the Court of Appeals Nominating Commission), and some members will have terms of three years. It did not appear to the Committee that this presented any substantial problem but, on the contrary, that it was desirable to have the terms of local members shorter so that those members who are from counties or circuits which have quite limited populations would not be restricted in their governmental and political activities for an unduly long period of time.

Section 51 merely provides that in the event of a vacancy in the office of Chief Judge of either the Court of Appeals or of the Supreme Bench of Baltimore City the duties prescribed for such offices by the Amendment will be performed by the senior associate judges of such courts.

In Section 52 it is provided that the lay members of the various nominating commissions will be appointed by the Governor from the qualified voters of the respective jurisdictions. This means that a lay member must reside in the jurisdiction which he represents on a commission. Lay members, by definition may not be practicing lawyers as that term is defined in the Amendment and it is further provided that they shall be chosen without reference to political party affiliations.

This last provision indirectly reflects a concern for what could be the one effective way in which the entire purpose and intent of the Amendment might possibly be thwarted by a Governor whose concept of the judiciary was limited to regarding it merely as another source of political patronage. The Committee, by including language requiring that appointments to nominating commissions not be based upon political considerations, is not too hopeful that an obvious political appointment would be set aside in the courts. It would involve some temerity for a judge to set aside an appointment because it was an attempt to introduce political factors into the selection of the judiciary. It must be

emphasized, nevertheless, that the sole purpose of the Amendment as drafted by the Committee, and certainly the only reason for an affirmative vote thereon by the voters of the State, is to remove from the judicial selection and election process any influence of partisan politics or of personal favoritism. The type of person appointed to the commissions, if the commissions are to succeed in their mission, must be one whose judgment is independent, whose experience is broad, and who has no private interest other than the common good or objective other than obtaining for the State of Maryland the best qualified lawyers to hold judicial office.

Much thought was given by the Committee as to whether the dangers recited above could be avoided by the establishment of various qualifications for the lay members of the commissions by requiring the membership to be bipartisan rather than non-partisan, or providing for ex-officio members, such as presidents of educational institutions, financial institutions, labor leaders, etc. The Committee finally decided that no such qualifications or list of ex-officio members would be desirable. The problem is complicated by the fact that there could be a total of 18 nominating commissions if Baltimore City, the First and Second Judicial Circuits and all of the counties in the other circuits elected to have nominating commissions for their judges. Reliance is placed, therefore, on the good judgment of the Governor and his respect for the possible adverse effects on his record and reputation which would result from making appointments inconsistent with the spirit and purpose of the Amendment, such as the appointment of persons who are politically or personally indebted to the Governor, or to whom the Governor is so indebted. It is reasonable to expect that under the proposed system which expressly forbids the action an improper appointment by the Governor would have such adverse effects, even though under the present system which contains no such prohibition a Governor's judicial appointments do not often cause him any political disadvantage.

The election of lawyer members of the various nominating commissions is provided for in Section 53. The nominating procedure for lawyer members for each type of nominating commission is basically the same. A committee composed of officers of the local bar associations in the jurisdiction to be represented by the commission and the President of the Maryland State Bar Association serve as a nominating committee for lawyers for vacancies on the commission. It is also possible for a lawyer to be nominated

for a vacancy upon the petition of a percentage of the lawyers in that jurisdiction. The nomination by bar association officers procedure was adopted by the Committee because it felt that it would result in a more orderly procedure for the election of lawyer members of a commission. The nomination by petition provision was inserted to prevent any small group of lawyers from controlling the nomination of lawyer members by controlling a bar association. The petition procedure is, however, a two-edged weapon. Its primary purpose is to prevent the domination of a commission by persons whose self interest is their sole concern. It can, however, be used to provide just another opportunity for partisan political activity or for popularity contests among members of the bar. Such exercise would most clearly be a misuse.

It is provided that the nominating committee may make one, two, or three nominations for each vacancy on a commission. This is designed to permit some flexibility in the manner in which the nominating procedure will operate in practice. There will be many instances where the lawyers in a particular jurisdiction are virtually unanimous in desiring to have a certain lawyer serve on a commission. In such case no purpose would be served by nominating more than one person for the vacancy. This would be particularly true in the smaller jurisdictions to which the Amendment may be made applicable.[36] It may be, however, that the members of a local bar feel that they ought to be given a choice between two or three nominees for such an important position. In such case it would be entirely proper for a nominating committee to nominate more than one lawyer for each vacancy. It is also provided that any candidate, however proposed, must be nominated for a particular vacancy. This will be particularly important when a jurisdiction first comes under the Amendment and there will be two positions for which the nominating committee for that jurisdiction must propose candidates. In such a case a nominee by petition might have a great advantage if he need not designate the position for which he is running.[37] It would probably be desirable also for the Court of Appeals to require that a lawyer

[36] Bar associations in this State have a well known tendency toward unopposed nominations for officers of the various associations.

[37] This practice has been quite common recently in judicial elections, particularly where several new judgeships are created or where a new court is created. The supporters of a particular candidate can then vote only for him and not for any other candidates, even though there may be six or seven vacancies, and thus make their vote count more heavily than if they had voted for as many candidates as there are vacancies. This practice is commonly known as "single shooting."

must receive a majority vote for election to a commission and to provide for a run-off election between the two highest candidates if no candidate receives a clear majority. If this is not required, two candidates of similar qualifications may split a majority of the vote, and a lawyer unacceptable to the majority might then be elected.

The membership of the nominating committees for lawyer members was designed to give as wide a representation as possible on a committee without making it unduly large. It seemed most appropriate to have each jurisdiction represented by the president of the largest local bar association. Although in most cases there is only one bar association, in certain jurisdictions in the State, particularly in Baltimore City, there is more than one bar association. Rather than attempting to have all such bar associations represented on the nominating committee, it was thought most practical to have only the largest bar association in each jurisdiction represented on the nominating committee. It is expected that most lawyers will be eligible to join the bar association which is the largest and, therefore, these associations would be the most representative. It seemed to the Committee a hopeless task to attempt to give representation to each bar association no matter how small, no matter what special interest the association represented and no matter how limited the number of lawyers eligible to join the association might be.

The responsibility of the members of the bar in electing their fellow members to act on behalf of the legal profession as members of commissions is just as great as the responsibility of the Governor in selecting lay members of the commissions. If a Governor succumbs to political temptation when dealing with judicial nominating commissions his conduct can perhaps be explained by the fact that he is the chief executive and has many responsibilities other than those connected with the selection of judges and is subject to strong political pressures. The lawyer, however, when he is acting as such in selecting other lawyers as representatives of the bar has no such other responsibilities. His sole function should be to elect only that type of person whom he feels will act in the best interests of the bar, the judiciary and the public.

The Amendment uses the term "practicing lawyer" in describing those lawyers who are eligible to elect and be elected lawyer members of nominating commissions. This term is defined in Section 54 to include those lawyers whose primary activity is as an attorney actually engaged in the practice of law or who hold an official position connected

with the legal profession or the courts. It seemed to the Committee that those persons whose primary activity is not as an attorney or intimately connected with the legal profession should not qualify as a lawyer under the Amendment. The legal profession is given representation on the nominating commissions equal to that of the rest of the public. Those whose principal or sole connection with the legal profession is that they were once admitted to practice by the Court of Appeals is not, in the opinion of the Committee, sufficient to entitle them to such preferential representation.

The Amendment also deems that a lawyer is of the jurisdiction in which he maintains his principal office for the practice of his profession. The Committee had to choose between basing this status upon the place of residence of the lawyer or the place where the lawyer maintains his office. The Committee decided that since a lawyer is, for the purposes of the Amendment, considered solely in his capacity as a lawyer and not as a citizen or a voter that the place where he practices his profession was the logical place in which he should participate in the judicial selection process established by the Amendment.

The Court of Appeals, in addition to regulation "straw" polls among lawyers, is also given the power to adopt procedures for the election of lawyer members of nominating commissions to the same extent that it has power to adopt rules of practice and procedure. It is contemplated that the Court will adopt rules for the entire process, including both nominating and election procedures.

Section 55 lays down a number of rules for activities of the commissions, the most important of which is the prohibition against members of nominating commissions holding any public office of profit (other than that of Notary Public) or political office while a member of a commission and for six months thereafter. The basic purpose of this prohibition is to prevent any outside influence being brought to bear upon a member of a commission because of any political or public office he might hold. The prohibition is limited to public office of profit because it was felt that the chances of any influence on a commission member because of his holding a public office which entitled him to no compensation was not likely to interfere with his commission duties. Likewise, the type of person who would be the most desirable to have on such commission is the same type that is most often appointed to non-paying public positions. In using the term "public office of profit" the Committee was of the opinion that the term

would not apply to the employment by a state agency of an attorney as counsel to that agency merely in a private capacity and not as a state employee.[38] The term political office is intended to include the officers and members of state central committees, political agents, financial agents and even officers of local political organizations, such as ward or district political groups.[39]

The last section, 56, is a statement that the subtitle shall supersede all provisions of Article IV inconsistent with the subtitle. This is inserted to insure that no dispute arises as to the application of the subtitle to a particular judicial vacancy.

The proposals of the Committee as incorporated in the Constitutional Amendment are the result of many long hours of study and deliberation by its members. The Amendment is designed to provide Maryland with a system of selection and tenure of judges which has only one purpose — a judiciary made up of the lawyers best qualified to sit on the bench. The proposed Amendment now awaits discussion and approval by the members of the Maryland State Bar Association before being submitted for the final approval of the Legislature and the people of Maryland.

[38] Examples of the former would be activities such as bond counsel on state bond issues and counsel specially retained by state agencies for a limited purpose such as local counsel for the State Roads Commission. In the latter group would be included such positions as Special Assistant Attorneys General.

[39] Sometimes the distinction between a political organization and a civic organization grows somewhat blurred. One bit of evidence would be the status of the organization under the Internal Revenue Code.