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## Application of the Missouri Court Plan to Judicial Selection and Tenure in America Today

Robert E. Allard  
*American Judicature Society*

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# Application of the Missouri Court Plan to Judicial Selection and Tenure in America Today

## **Erratum**

On page 388, footnote 33 cont'd which read: In a recent survey of Arkansas lawyers... Should have read: In a recent survey, Arkansas lawyers . . .

# APPLICATION OF THE MISSOURI COURT PLAN TO JUDICIAL SELECTION AND TENURE IN AMERICA TODAY

ROBERT E. ALLARD\*

## I. SELECTION OF QUALIFIED JUDGES

THE pivotal year in the twentieth century for judicial selection and tenure was 1940. In November of that year, the voters of Missouri made it the first state to adopt a merit selection and tenure plan for its appellate courts and the trial courts of general jurisdiction in its two metropolitan centers.<sup>1</sup>

In that same year, 1940, Charles S. Desmond was appointed to the supreme court of the state of New York.<sup>2</sup> His appointment, however, was not made under a merit plan similar to that which was adopted in Missouri. It was made under a provision of the New York Constitution.<sup>3</sup> The section provides that when a vacancy occurs otherwise than at the expiration of a term, "the governor, by and with advice and consent of the senate, if the senate shall be in session, or if not in session, the governor, may fill such vacancy as above by appointment. . . ."<sup>4</sup>

New York, of course, had been the key state in rejecting appointment as a method of selecting judges. In 1846, it substituted popular election for appointment for all judges.<sup>5</sup> New York was not the first state to make this change. Mississippi had switched in 1832 to election of judges.<sup>6</sup> But it was the example of New York which made the difference. Within fifteen years, less than a dozen states had failed to switch to election and it was the unanimous choice of every state admitted to the Union thereafter.<sup>7</sup>

The practice of New York was also followed as regards filling vacancies of unexpired terms created by death, resignation, removal or retirement, *i.e.*, gubernatorial appointment with or without confirmation. Thus, so-called elective states have consistently had a large number, if not a majority, of judges initially ascending the bench by appointment.

In the ten year period, 1948-1957, more than 56 per cent, 242 out of 434, of the justices of courts of last resort in thirty-six so-called elective states went on to the bench by appointment. Three such courts were composed entirely of appointed judges. Four states had over an 80 per cent average and ten elective states had 60 to 80 per cent of their judges appointed.<sup>8</sup>

An equivalent study of trial courts has not yet been undertaken, but

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\* Director of Special Projects, American Judicature Society.

1. Crowder, *The Operation of the Missouri Non-Partisan Court Plan*, 27 J. Am. Jud. Soc'y 166-70 (1944).

2. Who's Who in America 510 (1964-1965).

3. N.Y. Const. art. VI, § 4 (1926).

4. *Ibid.*

5. N.Y. Const. art. VI (1846).

6. Haynes, *Selection and Tenure of Judges* 100 (1944).

7. Winters, *Selection of Judges in New York and in Other States* 21 (1943).

8. Kerian, *Injunctions in Labor Disputes: History of the Norris-LaGuardia Act*, 38 N.D.L. Rev. 60 (1962).

specific instances indicate a similar condition. Eight years ago, 70 of the 78 judges then sitting in the Los Angeles Superior Court had gone on by appointment. Two-thirds of the general trial judges now sitting in New Mexico were appointed; 19 of the 41 Colorado district judges in 1963; 29 of 36 Philadelphia Common Pleas judges from 1896 to 1937; 42 per cent of the Wisconsin circuit judges up to 1953; three-fourths of the Minnesota district judges sitting in 1941; 66 per cent of all Texas judges between 1940 and 1962—all these are appointed judges in so-called elective states.

If to the number of judges formally appointed by governors to fill vacancies, is added those *de facto* appointees whose names are selected by political party leaders to run without opposition or on coalition tickets so that the voters have no choice, the percentage is even higher.<sup>9</sup>

There has been no precise study, to the author's knowledge, of how judges in New York have initially gone onto the bench; but, on the basis of the evidence from other states, it seems fair to assume Charles S. Desmond was neither the first nor the last New York judge since 1846 to begin his judicial career by appointment.

This type of "one-man" judicial appointment was only a variation of one of the four principal methods of judicial selection which had been used up to 1940. Executive appointment with or without confirmation, selection by the legislature, partisan political election, or nonpartisan political election comprised the four choices. In 1940, Missouri became the first state to adopt an additional choice which had been in existence since 1913 as a proposal.

Professor Albert M. Kales of the School of Law of Northwestern University had proposed that an elective officer of the state appoint judges from a list of qualified candidates selected by an impartial commission. This plan was embodied in a State-Wide Judicature Act, a model state court system, published in 1914 by the American Judicature Society.<sup>10</sup> Its essential features were incorporated into the Model State Judicial Article approved in 1962 by the House of Delegates of the American Bar Association.<sup>11</sup> In that same year two states, Iowa and Nebraska, adopted by constitutional amendment merit selection for all state court judges. Thus, in 1962, some or all judges were appointed by the governor with confirmation, approval or consent by a legislative body, council or commission in nine states: California (appellate judges), Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey and Rhode Island. In addition, initial appointments in Maryland were made by the governor, but the judges so appointed had to stand for election on a partisan ballot at the first election one year or more after appointment. In four states, Rhode Island, South Carolina, Vermont and Virginia, some or all judges were chosen by the legislature. The elective method

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9. Winters & Allard, *Two Dozen Misconceptions About Judicial Selection and Tenure*, 48 J. Am. Jud. Soc'y 138, 140 (1964).

10. 7 Bull. Am. Jud. Soc'y 61, 84 (1914).

11. *Text of the Model Judicial Article*, 47 J. Am. Jud. Soc'y 10 (1963).

of judicial selection was still in force for some or all judges in thirty-six states. In sixteen of these "elective" states, a separate nonpartisan ballot was used for voting on judges; in the other twenty, judicial candidates were listed under their party designations and took their chances with the rest of the party ticket.<sup>12</sup>

Merit selection was used for selecting some or all judges in Alabama, Alaska, Iowa, Kansas, Missouri, Nebraska, and Oklahoma. In 1963, Colorado and Florida joined this growing list of states. In 1965, the North Dakota legislature approved a constitutional amendment providing for merit selection of all state court judges which goes in 1966 to the voters for approval. It now appears that not less than fifteen other states will take merit selection proposals, either by petition to the voters in 1966 or to 1967 legislative sessions.

What is merit judicial selection and how does it work? Selection is by appointment of the governor, but is restricted to a list of nominees, usually three, named by a commission of both lawyers and non-lawyers, who may not hold any public office or any official position in a political party. Nominating commissions are usually composed of an equal number of lawyers, elected by the bar, and non-lawyers, appointed by the governor, with a judge serving as chairman. A description of the actual procedure has been set forth by Elmo B. Hunter, who, as a presiding judge of the Kansas City Court of Appeals, was chairman of the five-member judicial commission charged with providing nominees for vacancies on the trial court of general jurisdiction in the Kansas City, Missouri, metropolitan area:

Just a few months ago two of our trial judges retired because of a combination of age and illness. This created two judicial vacancies. Our judicial nominating commission issued a public statement carried by our press and other news media that the nominating commission would soon meet to consider two panels of three names each to be sent to the governor for him to select one from each panel to fill the vacancy, and that the nominating commission was open to suggestions and recommendations of names of those members of our bar best qualified to be circuit judges.

It received the names of many outstanding and highly qualified lawyers who were willing to be considered by the commission because of the nonpolitical merit type of selection involved. The commission on its own surveyed all eligible lawyers in the circuit to see if it had before it the names of all those who ought to be considered. From all sources the commission ended up with fifty-seven names.

After several weeks of careful study by the commission, the list of eligibles was cut to twelve then to nine and finally to those six who the members of the commission sincerely believed to be the six best qualified of all. Those six names, three on each of the two panels, were sent to the governor who, after his own independent consideration of them, made his selection of one from each panel. His selections were widely acclaimed by the press and the public as excellent choices

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12. *The Courts, The Public and the Law Explosion* 149 (Jones ed. 1965).

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from two very outstanding panels. The commission was glad to see the governor get this accolade, but its members knew that no matter which one of the three on each panel he selected, the people of Missouri would have been assured an outstanding judge.

It might be noted in passing that each of the two panels of three names submitted to the governor happened to contain the names of two Democrats and one Republican. The governor was a Democrat. He appointed a Democrat from one panel and a Republican from the other. I do not think this was deliberate. I am convinced that our plan has so proven its merit that our governor, who is oath bound to follow the constitution, shares its spirit as well as its letter. He selected the two he thought best qualified, irrespective of political party.

This is not an isolated instance. Another rather dramatic example occurred just a few years ago when our legislature created three new judgeships for the Kansas City area to meet the increasing cases resulting principally from population growth. The judicial selection commission sent three panels of three names each to another Democratic governor. On each panel there were two Democrats and one Republican. The governor appointed two Republicans and one Democrat.<sup>13</sup>

Warren E. Hearnes, governor of Missouri, has confirmed this tendency of Missouri governors to cross political lines in making judicial appointments. In a recent speech, he pointed out that, "of the first 60 judges appointed under the Plan, 48, or 80 per cent were Democrats and 12, or 20 per cent, were Republicans before they went on the bench."<sup>14</sup> He went on to point out that 70 per cent were from the same party as the appointing governor, and 30 per cent of the opposite political party.<sup>15</sup> Governor Hearnes declared, however, that "I think it very doubtful whether the Republicans could have had many, if any, persons sitting on the Missouri bench, if the elective system had prevailed during the past twenty-five years. As you may know, the last Republican governor in Missouri was elected in 1940 and then by a very narrow margin. Therefore, on a state-wide basis it is highly unlikely that many of the Supreme Court Justices would have been Republican and the partisan complexion of St. Louis City and Jackson County was such that in these two metropolitan areas it is doubtful that the Republicans would have been very successful at the circuit court level."<sup>16</sup>

After twenty-five years of experience, how do the lawyers of Missouri feel about this method of judicial selection? Here is the judgment of Loyd E. Roberts, immediate past president of the Missouri Bar, who asked "a number of lawyers representing a good cross-section of all types and interests of lawyers

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13. Hunter, *A Missouri Judge Views Judicial Selection and Tenure*, 48 J. Am. Jud. Soc'y 126, 130 (1964).

14. Hearnes, *Twenty-five Years Under the Missouri Court Plan*, 49 J. Am. Jud. Soc'y 100, 103 (1965).

15. *Id.* at 103.

16. *Id.* at 103.

and law practices across the state to give their written, objective, confidential opinions to him . . . . Without exception, every lawyer confirmed the writer's opinion that the plan has functioned for good. There is also a corollary to the foregoing conclusion, and that is the almost universal opinion among lawyers in Missouri, that the system is superior to the system," partisan political election, "which it supplanted."<sup>17</sup>

These conclusions drawn by Mr. Roberts have been verified by a thorough and detailed study by a group connected with the University of Missouri. Although its findings have not been made public, some of the information was given to Mr. Roberts who reported that,

questionnaires were sent to 3,306 lawyers in the state (roughly half of our enrollment); 1,236 voluntarily responded. The sample taken therefore represents about 20 per cent of the lawyers of the state. Seventy-nine per cent of those from Kansas City and 70 per cent of those from St. Louis who responded, favored the Nonpartisan Court Plan for circuit judges. The sample further revealed that on a state-wide basis (including lawyers from Kansas City and St. Louis), 61 per cent favored the Nonpartisan Court Plan method of selecting circuit judges. Another 12 per cent favored a nonpartisan selection of judges without commitment to a specific plan. Thus, over the entire state, 73 per cent (61 per cent and 12 per cent) favor a nonpartisan selection of circuit judges. The poll further revealed that only 12 per cent favored the outright elective process for circuit judges.

The significant figures are those from Kansas City and St. Louis, which respectively favor the nonpartisan selection of circuit judges by 79 per cent and 70 per cent. These are the only two areas in the state which actually have the nonpartisan plan in operation on the circuit court level.

We have no figures on the popularity of the plan on the Supreme Court and the three courts of appeal levels, but it is safe to say that in these areas, there is overwhelming approval of the plan. One hears few objections to the plan on these levels. Such complaints as are heard are on the circuit court level.<sup>18</sup>

Perhaps even more important than lawyers' opinions are those of responsible civic leaders who have watched merit judicial selection in action during the past twenty-five years. Robert A. Schroeder of Kansas City, Missouri, president of the Missouri Bar, quoted four representative civic leaders in a recent speech.

John W. Colt, executive editor of The Kansas City Star, has said: "Public pride and confidence in our courts have become a Missouri tradition since adoption of the Missouri court plan 25 years ago."

Mrs. Stephen D. Hadley, president of the League of Women Voters of Kansas City, has stated: "The right of the people to determine who shall judge them is one of the most important privileges

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17. *Id.* at 92.

18. *Id.* at 95-96.

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we possess. Under our Missouri Plan, we insure the right of the people to make that choice, not blindly, but intelligently, on the basis of able judicial performance."

Carl L. Stevens, Area Director of the United Auto Workers, AFL-CIO, has observed: "It is as important to labor as to any other segment of our society that we have and maintain an independent judiciary of capable, honest men of complete personal integrity. We are extremely happy that our Missouri Plan has given us this kind of judiciary."

John A. Morgan, president of the Butler Manufacturing Company, puts it this way: "Any enterprise, be it business, education or government is successful if the right men get on the job and work at getting that job done. This is one of the reasons why I favor the Missouri Court Plan. Judges spend their time deciding cases, not running for the next election. They do not have to worry about being swept out of office as long as they do their job because they are judged only on their performance. As a result, our courts are doing a good job."<sup>19</sup>

While such assessments can hardly be thought of as conclusive of the worth of one particular method of judicial selection over another, it should be noted that an exhaustive search of the literature on judicial selection has never revealed an equivalent set of positive judgments about partisan political selection of judges, particularly not in New York. The best that Samuel I. Rosenman, president of The Association of the Bar of the City of New York, could say was

that any system of judicial selection, no matter how bad, will, from time to time, produce many qualified judges—and even some outstanding judges. This has certainly been true of my own State of New York, which still uses the political, elective system. However, the election of some excellent judges does not prove that the best—or even that a good—method of selecting them is in operation.

Let us face this sad fact: that in many—in far too many—instances, the benches of our courts in the United States are occupied by mediocrities—men of small talent, undistinguished in performance, technically deficient and inept.<sup>20</sup>

In a similar vein, Herbert Brownell, Attorney General of the United States in the Eisenhower administration, has said: "As a matter of hard fact, judges are in most instances picked by political leaders. This is quite obvious in the case of elected judges. The party conventions and primaries that nominate judges are managed by professional politicians. This is what politicians are for. Sometimes they have good candidates nominated, but most often their favor . . . shines on mediocre candidates."<sup>21</sup>

These are not just the opinions of lawyers. Since 1962, there have been over fifteen state citizens' conferences on court modernization where representa-

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19. *Id.* at 108.

20. Rosenman, *A Better Way to Select Judges*, 48 J. Am. Jud. Soc'y 86, 87 (1964).

21. *Saturday Evening Post*, April 18, 1964.

tive leaders of all segments of state life have been brought together to study, discuss and assess methods of judicial selection. Over 2,500 civic, business, labor, industrial, professional, educational and religious leaders have been almost unanimously convinced that merit judicial selection is far superior to any other method presently in use. Suggestive of this unanimity is the conclusion reached at the Twenty-seventh American Assembly at Arden House on "The Courts, The Public and The Law Explosion," where over seventy such leaders studied this problem and concluded:

A plan of merit judicial selection and tenure should be adopted in every state and made applicable to the selection of all judges, from judges of courts of last resort down to and including the magistrates in lower criminal courts, small claims courts and the like. We commend the practicable and proved method of merit judicial selection now embodied in the Model Judicial Article of the American Bar Association.<sup>22</sup>

They further concluded that:

Pending the enactment of merit judicial selection, state and municipal executives should, on a voluntary basis, follow the procedures of the merit selection plan in exercising their appointing powers. Governors and mayors who take this step are to be commended.<sup>23</sup>

It must be noted that Mayor Wagner has had such a voluntary committee operating and that Mayor-elect Lindsay has publicly declared his intentions, not only to continue this practice, but to support a constitutional amendment to make it mandatory in the future.<sup>24</sup>

Merit judicial selection is coming. On the basis of present indications, it is not only possible, but probable that more than half of the states will have some form of merit selection of judges before another decade has passed. It is even conceivable that some form, voluntary or even mandatory, of merit selection may emerge in the selection of federal judges.

## II. RETENTION OF QUALIFIED JUDGES

Selection is only one part, albeit an important part, of the search for an independent and competent judiciary. Tenure is an equally important consideration. Assuming that the best judicial talent available is placed on the bench, how are such judges to remain on the bench so that litigants, lawyers, and the tax-paying public derive the maximum return on their investment in training a competent judge?

There are four basic methods of judicial retention. The first is at the will of the appointing authority. This method has never prevailed in the United States.

A second retention method is for life, or during good behavior. This has

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22. *Final Report of the 27th American Assembly*, 49 J. Am. Jud. Soc'y 17, 18 (1965).

23. *Id.* at 18.

24. 49 J. Am. Jud. Soc'y 156 (1965).

characterized retention of judges in the federal judiciary and a few of the original states. Life tenure was a major issue in the Convention of 1867 in New York, but in spite of powerful advocacy, it was defeated.<sup>25</sup> Warranted by the facts or not, there has been persistent criticism that this method not only produces a type of judicial autocracy, but also that the unethical or incompetent judge is frozen into office.

The most widely accepted retention provision has called for re-election of judges for short terms in partisan political or nonpartisan political competitive elections on the same or separate ballots from other candidates for executive and legislative offices. The little empirical evidence available suggests that, in such elections, voters have neither ability, information nor inclination to assess the qualifications of a long list of judicial candidates. The most impressive evidence was a survey of 1,300 men and women in New York over and under the age of 45 immediately after the 1954 general election which revealed that while virtually all could remember the name of the gubernatorial candidate for whom they voted, over 75 per cent of those who voted for judges could not name one of the judicial candidates for whom they had voted. But the most revealing fact was that 402 of the 1,300 interviewed were from a semi-rural area, Cayuga County, and over 95 per cent of this group could not name one judicial candidate for whom they had voted.<sup>26</sup>

Further, judicial elections are often affected by issues entirely unrelated to the qualifications of the incumbent judge. The late Fred L. Williams, a distinguished Missouri jurist, is reported to have said that he was elected to his state's Supreme Court in 1916 because President Wilson kept the country out of war, but was defeated for re-election in 1920 because the President had failed to keep the country out of war.

Retention in office of a competent judge can even rest on a point as small and absurd as the name of the incumbent judge's opponent. On this score, the experience of Justice W. St. John Garwood, now retired from the Supreme Court of Texas, is pleasantly pertinent. Appointed to the bench to fill an unexpired term, Justice Garwood faced re-election not long after he had taken office. He reports:

[I]t looked like I would have no opposition—up until the last hour of the last day for getting on the ballot, when a rival dropped his name and filing fee in the mailbox. While over the years he had successively but unsuccessfully run for the offices of State Superintendent of Public Instruction and Railroad Commissioner, hardly one out of fifty lawyers or even his own home town knew he had a law license or knew or remembered who he was. He did not even have a law office number in the telephone book. To this day I have never heard of anyone who has even heard of him appearing professionally in any court. But his name was Jefferson Smith, while mine was W. St. John Garwood,

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25. 2 Lincoln, *Constitutional History of New York* 257 (1906).

26. *How Much Do Voters Know or Care About Judicial Candidates?*, 38 J. Am. Jud. Soc'y 141-43 (1955).

the latter involving all sorts of unfavorable political implications including affiliation with the Vatican. Moreover, only a short time previously, Texas has been enjoying a very popular movie-show called "Mr. Smith Goes to Washington," in which the appealing young hero, well played by a popular actor, was named Jefferson Smith. Well, they were counting the votes for days, and but for the fact that I was then domiciled in the largest Texas city and pretty well acquainted in one or two other large ones, my judicial career would have ended almost as soon as it began. The race was so close that Jefferson Smith still thinks I stuffed some Houston ballot boxes.<sup>27</sup>

And for fear that any reader might think that such a situation could only happen in Texas, a highly regarded judge in the state of Washington was almost defeated in 1962 by a lawyer opponent named Robert Kennedy. In the 1964 elections, a jurist with sixteen years of distinguished service on the bench was defeated by an opponent whose last name just happened to be Johnson.

In some states, attempts have been made to encourage political parties to give preference to incumbent judges when up for re-election. It appears that this method is inadequate because it is only voluntary and appears to be used only when it is advantageous to the party leaders. Richard Croker's remark when he denied renomination to Supreme Court Justice Joseph F. Daly in 1899 is not unlike equivalent reports in recent years. Croker is quoted as having said "Justice Daly was elected by Tammany Hall after he was discovered by Tammany Hall, and Tammany Hall had a right to expect proper consideration at his hands."<sup>28</sup>

Even if the incumbent judge is successful in securing renomination for office, he is obligated to run for the office and the party or group with whom they are affiliated. This "ordeal" and its irrelevancy for incumbent judges has been fulsomely analyzed by Price Daniel, former governor of Texas. In an attempt to justify the exclusion of the judiciary from the elective process Mr. Daniel had this to say:

Senators, governors, and legislators must take their cases to the people because they are the representatives of the people in making or advocating changes in our laws. Not so with judges; they are not supposed to make or change the laws; they do not represent the people in such activities. It is their duty to interpret the law as they find it to be and apply it to the facts. They should be free from the political necessities of partisan campaigns and the expense, pressures, abuse, conscious or subconscious feelings of obligations, and the time consuming tasks which are inherent in the usual election campaigns.

No judge can devote the full and complete time necessary for the maximum exercise of his judicial ability when he is having to prepare for, and keep his eye on possible opponents or worry about the effect his decisions may have on the next election. Such conditions work against the independence of the judiciary envisioned by our

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27. Garwood, *Judicial Selection and Tenure—The Model Article Provisions*, 47 J. Am. Jud. Soc'y 21, 22-23 (1963).

28. Conboy, *The Selection of Judges*, 2 N.Y.U.L. Rev. 27, 29-30 (1925).

founding fathers as a necessity for the protection of our liberties and of justice under law.<sup>29</sup>

To permit the competent judge to "devote the full and complete time necessary for the exercise of his judicial ability" and, at the same time, avoid the potential pitfalls of non-accountability for judicial behavior were the bases for the fourth method of judicial retention. As a companion to his merit selection method, Professor Kales advocated a periodic non-competitive re-election wherein the incumbent judge would seek retention in office at the end of each term. His name would be placed on the ballot without opposition and the voters would be asked whether he should retain the office. The incumbent judge would, in effect, be running against his record.<sup>30</sup>

Such a method reserves to the voters a veto of judicial candidates based on performance on the bench. While voters are seldom in a position to make sound judgments as to the qualifications of a prospective judge, voters can and have been able to assess records of judicial behavior. In 1942, a judge in Kansas City, who had taken office prior to the adoption of merit selection, came up for re-election. Charges were made that he had handed down unfair decisions, played politics from the bench, and was guilty of unjudicial conduct. Running only against his record, he was defeated by a vote of 42,000 to 37,000.<sup>31</sup>

At the same time, it is true that no judge appointed under the merit plan in Missouri has been removed from office by vote of the people during the past twenty-five years. It is also true that an incumbent judge's campaign fund must include only the costs of filling out his statement of intention to remain in office and purchasing a stamp to mail it. No judicial time is lost and the qualified judge is not removed from office because he may not possess political appeal or because of purely political tides.

From the very beginning, this was the Missouri experience. In 1942, the state went Republican, but two judges of the Supreme Court, both Democrats, were retained by two-to-one votes. Six circuit judges, all Democrats, were up for re-election that same year in St. Louis. The city voted Republican, but all six judges were re-elected by two-to-one majorities.<sup>32</sup> Even in face of the Johnson landslide of 1964, all incumbent judges, both Democrats and Republicans, in Iowa, where merit selection had been adopted in 1962, were retained in office. This kind of security has a definite appeal to a successful lawyer who is asked to give up a flourishing and profitable practice to go on the bench.<sup>33</sup>

### III. REMOVAL OF UNQUALIFIED JUDGES

The one justification for re-election procedures is that it provides a means, other than impeachment, to get rid of a judge. Any thoughtful observer of the

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29. Daniel, *Lawyers Should Lead in Judicial Tenure Reforms*, 49 J. Am. Jud. Soc'y 109, 110 (1965).

30. 7 Bull. Am. Jud. Soc'y 87 (1914).

31. 54 Mich. Alum. Q. Rev. 240 (1948).

32. Hyde, *The Missouri Plan for Selection and Tenure of Judges*, 9 F.R.D. 457 (1950).

33. 1965 Arkansas Judiciary Comm'n Rep. to General Assembly, Appendix Report.

judicial scene, however, recognizes that elections are not the most economical and efficient method of removing a judge from office when his inability or unworthiness to hold that office has been demonstrated. Mandatory retirement with the possibility of continued temporary assignment is one effective and necessary adjunct to maintaining an effective and vigorous bench. New York is fortunate to be among a growing number of states with such retirement provisions.<sup>34</sup>

Senility, impairment by accident or disease, serious emotional problems and the equivalent which create incapacity to handle judicial office are not, however, restricted only to judges who have reached mandatory retirement age. An effective method of disability retirement is also needed. Again, New York has such a system in its court on the judiciary.<sup>35</sup>

The same court on the judiciary, created by constitutional amendment in 1947, has power to remove a judge from office for cause. It was first convened in 1959.<sup>36</sup>

Recognition of the need for both disability retirement and removal for cause has led an increasing number of states to adopt such procedures. An increasing number of states have created, either by statute or constitutional amendment, either a court on the judiciary similar to that of New York or a commission plan similar to the one first set up by California in 1960.<sup>37</sup>

In contrast to the typical court on the judiciary which is usually composed only of judges and before which only certain charges can be brought by a limited number of designated persons by specific procedures, the California commission is an investigative body composed of judges, lawyers and non-lawyers with a permanent staff. It receives complaints from any source and carries on confidential investigations and hearings before any charges, in the form of recommendations to its Supreme Court, are made public. Within four years, it had received 344 complaints and had directly caused the resignation or retirement of twenty-six judges.<sup>38</sup> During the 1965 legislative sessions, constitutional amendments embodying similar plans were passed in Florida, Maryland, Nebraska, Oklahoma and Texas. The Texas proposal was adopted by the voters at a special election in November, 1965, by almost a three-to-one

In a recent survey of Arkansas lawyers with 10 to 15 years of practice were asked whether they would consider becoming a judge under the present partisan election system which involves periodic re-election. Only 38.9% responded favorably in contrast to 67% who indicated they would consider becoming a judge under a merit selection plan where they would only be required to run against their record without opposition.

34. *Summaries of Judicial Salaries and Retirement Plans*, 47 J. Am. Jud. Soc'y 129, 140 (1963).

35. *Id.* at 140.

36. Brand, *The Discipline of Judges*, 46 A.B.A.J. 1315, 1316 (1960).

37. Frankel, *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A.J. 166-171 (1963).

38. Burke, *Judicial Discipline and Removal, The California Story*, 48 J. Am. Jud. Soc'y 165, 170 (1965).

majority.<sup>39</sup> The other amendments will go to the voters in 1966.<sup>40</sup> At least six other states have similar proposals under study.

The record of state court modernization accomplishments from the beginning of this century up to the beginning of this decade has been something less than dramatic. Since 1962, however, the pace has quickened and the scope has been extended. More than half of the states have either adopted sweeping changes or have significant proposals for reorganization of the courts or judicial selection, tenure, retirement or removal under serious study. There is, in fact today, a "National Movement to Improve the Administration of Justice."<sup>41</sup>

New York became part of the vanguard of the movement to modernize archaic court systems when it adopted the first steps toward court reorganization and administration in 1961.<sup>42</sup>

Mayor Wagner's voluntary use of a modified merit system and introduction of an amendment in the last legislative session to create a permanent nominating commission for merit selection of those judges appointed by the mayor of New York City are, hopefully, signs that New York may also become part of the vanguard of the movement to modernize methods of selecting and retaining competent judges on the basis of merit.<sup>43</sup> If, however, New York is to be part of this vanguard deliberate speed is required. A growing number of states are on the march. Unless New York acts within the next five years, it is very likely to find itself in the rear ranks of the states which are bringing their courts and their judges into the twentieth century.

39. 49 J. Am. Jud. Soc'y 154 (1965).

40. Clark, *Citizens, Courts, and The Effective Administration of Justice*, 49 J. Am. Jud. Soc'y 6, 8 (1965).

41. Winters, *The National Movement to Improve the Administration of Justice*, 48 J. Am. Jud. Soc'y 17-22 (1964).

42. *New York Court Reform Signed Into Law*, 45 J. Am. Jud. Soc'y 326-27 (1962).

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