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Kenneth A. Manaster
Santa Clara University School of Law, kmanaster@scu.edu

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KENNETH A. MANASTER is a graduate of Harvard University (A.B. 1963, LL.B. 1966) and is associated with the firm of Leibman, Williams, Bennett, Baird and Minow. Following graduation from law school, he studied on a Fulbright fellowship in Lima, Peru, and then served as law clerk to United States District Court Judge Bernard M. Decker. He is a member of the Joint Committee on Judicial Article and of the Association's Committee on Candidates. He also served in 1969 as associate counsel to the Special Commission of the Supreme Court of Illinois.

The lawyers of Illinois have known for a long while that the judicial system is not what it should be. In 1970, probably more so than at any other time in this century, this knowledge is no longer the exclusive property of the lawyers. Citizens' groups, the press, leaders of the state legislative and executive branches, and the "man on the street" as well, speak of "the crisis in our courts" and "the shadow cast on the courts."[1] The Supreme Court of Illinois has found itself compelled to take unprecedented steps in order "that the confidence of the bar and the public in the integrity of this Court not be further impaired."[2] There can be little doubt that the revelations regarding Justices Solfisburg and Klingbiel and Judge Kizas reflect serious inadequacies in the judicial system, particularly in the working for selection and removal of judges.

The organized Bar of Illinois for over 20 years has worked vigorously to restructure the machinery for selecting our judges.[3] The main purpose of these efforts has been to improve the quality of our judges and, accordingly, the quality of justice in this state. In 1952, the Chicago Bar Association and the Illinois State Bar Association announced their support for a merit selection plan for judicial positions. Although the political realities of the late 1950's and the 1960's required the Bar at times to concentrate on much-needed administrative restructuring of the courts, the Bar's early commitment to obtain outstanding judges through a merit selection plan has remained firm.[4] In 1970, with public demand for judicial reform aroused by the proven misconduct of a few judges, and with the Constitutional Convention charged to reassess

the basic structure of Illinois government, the Bar must again insist upon judicial reform that *will* bring us better judges.

No one would say that *all* our judges fall below the standards we are entitled to demand of them; there are many capable and even outstanding men on the bench in Illinois. It is difficult to dispute the proposition, however, that the present system for selection of judges has not produced as many outstanding men as judges as we could have, though we know such men are with us at the Bar. A proven system for placing qualified men on the bench is available in the merit selection plan which the Chicago Bar Association and the Illinois State Bar Association presented before the Judiciary Committee of the Constitutional Convention in Springfield beginning on February 3, 1970.

The Plan and Its Rationale

The main features of the merit selection plan are that judges shall be nominated by independent commissions of laymen and lawyers appointed, respectively, by the Governor and the Bar. The commission in each judicial circuit will make an intensive search for the best qualified lawyers for judicial vacancies and will submit three names to the Governor for each opening. The Governor will then promptly make the selection of the judge from the nominees submitted to him. Within a short time after selection by the Governor, the new judge will go before the voters, without a candidate opposing him, on the issue of whether or not he should be retained in office. If he is retained, he then serves a full term before facing the voters on the retention issue again if he wishes to continue in his post.

These are the bare outlines of the plan as proposed to the Constitutional Convention. The lawyers and laymen who favor this plan, as well as those who now doubt its wisdom, can best discuss it only after they have familiarized themselves with the main provisions of the plan as prepared by the Joint Committee on Judicial Article of the Chicago Bar Association and Illinois State Bar Association. Sections 10 and 11 of the proposed plan, on "Selection and Tenure of Judges" and "Judicial Nominating Commissions," respectively, are set forth below in the Appendix following this article.

There is one overriding, affirmative reason why the merit plan should be adopted at the Convention and approved by the voters: The plan provides the best means for selection of the best possible judges in a manner consistent with the ideals of democracy. Our immediate goal is to obtain outstanding judges; yet our greater goal is government with the participation and consent of the governed. The merit plan harmonizes these goals. Regrettably, the system of popular election of judges now in effect in Illinois has been proven to completely elevate the appearance of democratic process at the expense of the goal of outstanding judges.[5]

Politics and Democracy

The merit plan establishes nominating commissions with the sole responsibility of finding the best nominees for judicial posts. The intellectual and personal characteristics of a potential nominee, his experience at the Bar, his scholarship, his standing as a man highly respected in his community—

all of these and more criteria *relevant to possible service as a judge* can be impartially and thoughtfully examined by the commission members. The commission members are beholden to no one but the public, which must carefully evaluate the nominees as well as the Governor's selections.

There are those who say the commission members will be "politically" indebted to the Governor who appoints them and to his party. The proposed plan contains a number of features which eliminate any such possibility:

First, no more than half of the lay members appointed by the Governor may be of the same political party; thus political balance is to be maintained in each Commission.

Second, the terms of members are six years, staggered at the outset with half of the initial appointments for only three years; thus within a few years the commissions will contain laymen appointed by different governors of different political parties.

Third, the lawyer members are not appointed by the Governor, but are elected by the Bar; this not only provides commission members qualified to assess the professional credentials of prospective nominees, but also further ensures the commissions' independence from the Governor and the political parties.

Fourth, commission members are barred from renewed service on a commission, and from judicial service as well, for three years following service of a full term on a nominating commission; this safeguard removes any incentive for a member to curry favor with his fellow members and the Governor.

The independence of the commissions thus promotes rational, impartial selection of the best men, without political favors or debts coming into play. The question may be asked, however, whether this built-in independence is consistent with democracy. The answer is that this independence is fully consistent with our ideals of effective democracy. The answer lies first in the Governor's responsibility, and vulnerability, to the voters; second in the voters' right to remove a new judge from office at the initial or subsequent retention elections; and third in the force of informed public opinion overseeing and influencing the actions of the commissions and the Governor at all times.

As to the Governor, the merit plan thrusts him into the spotlight as soon as a commission submits three names for a vacancy. He must immediately make the names public, and must make his selection within 28 days. Unlike the secret slate-making of our political parties, *the Governor's alternatives will be known to the public.* A Governor who makes unwise selections of judges risks being thrown out of office at the polls. It is far easier for the public to accomplish that than it is for the voters to diminish the power of the party leaders who now handpick the judicial slates the voter finds facing him on election day. In many instances, especially in Chicago, the public does not even know who the party slate-makers are. Beyond this, who of us at the Bar has not found himself bewildered at the array of names offered as judicial candidates on election day? Must not similar confusion, and a great sense of futility, prevail in the voting public

at large? The merit plan clearly identifies the nominators and the nominees, giving the public the information it is entitled to have.

The Governor is directly accountable to the voters and must consider not only immediate comment on his choice but also the effects of that choice at the next election to be faced by him and his party.[6] The public will know exactly which nominee he chose and how that nominee's qualifications compared to the others'. As one experienced observer has noted, "Even the most politically minded governor knows that good appointments are a source of political strength and he wants them to be as good as possible."[7] It is the will of the people, fortified by the relevant information the commissions will make available, which will ultimately control the Governor's choice. This is democracy in a truer, more responsible sense than we have now when political chieftains choose the judicial candidates and a small proportion of the voters submissively ratify the politicians' choices.

The retention vote provision, which already is in effect in Illinois, will have greater meaning for the voters when the initial selection by the Governor is made publicly from qualified nominees. It is probably true that the retention vote system will very seldom turn a judge out of office. Actually, it is only in the rare instance that a judge should fail to be retained in office—at least this is true if the initial choice of the judge is wisely made. Our judges deserve security of tenure in office; their independence in judging is promoted by it, and this independence is indispensable to the protection of our liberties. One especially wonders how seemly it is, in an age in which so many civil litigants and criminal defendants are charging government leaders at various levels with violations of individual rights, for the judges deciding these cases to have been chosen for the bench by the very same leaders being brought to judgment before them. The retention scheme alone does not assure independence in our judges; the initial manner of choice is all-important.[8]

If judges are sensibly and impartially selected at the outset, however, they *should* be retained in office unless they are guilty of serious dereliction of duty or personal misconduct. Thus it is not necessarily wrong, or a defect of the merit plan, that judges ordinarily will be retained in office by the voters. The safety valve of the retention vote is but another aspect of the merit plan's preservation of the rights of the people.[9]

The merit plan, in short, will provide a sensible, open, and impartial way to select the best possible judges. At the same time it will provide the people of Illinois with *the facts and the voting power* necessary to keep the selection of our judges always subject to the democratic will.

Objections to the Plan

It might be said that there are four main objections to the merit plan: (1) The judiciary is perfectly fine as it is and will not be significantly improved by the plan. (2) The plan will not take politics out of the courts and therefore will not produce better judges. (3) The merit plan will not produce better judges even if politics are substantially absent from the selection process. (4) The plan is undemocratic and therefore objection-

able, regardless of the results it produces.

My discussion of the plan thus far meets each of these points: The present situation is not satisfactory; the plan will substantially reduce the usual political considerations which are irrelevant to a man's qualifications for a judgeship; the plan has been proven in Missouri and elsewhere to produce more qualified, independent judges; and the plan is more consistent with effective democratic process than is the present political election system.[10] A few other areas of objection and doubt must also be considered.

One objection sometimes raised is that a merit selection system will make it almost impossible for members of various ethnic groups, especially minorities, to become judges. The irrelevancy of this argument to the public's need for a fair and qualified judiciary should not be underestimated. Judges do not, and should not, have "constituencies." The notion is inherently contrary to the principle that a judge must apply the law equally to all persons, regardless of their ethnic (or political) backgrounds. It may further be noted that on occasion minority group judges are found leaning over backwards to avoid the appearance, and the reality, of preference for their ethnic brethren. Finally, experience in Missouri and other states, plus plain common and political sense, indicate that the nominating commissions' offerings and the Governor's selections will produce an overall ethnic balance. Qualified men will be selected regardless of, not because of, their ethnic identity.

Perhaps a further word is warranted regarding the question of politics within the plan. The plan is not wholly nonpolitical — the Governor will be involved, many well-known lawyers and laymen active in their communities will serve on commissions, most of the nominees will be well-known figures, and the public, the political parties, and the press will assess all that is done, especially when the Governor stands for re-election and the judges stand for retention. Politics is a salutary and necessary part of the plan because it represents public participation and control. Politics in the more limited sense of Bar participation in the workings of the plan will undoubtedly take place; this "politics" is clearly more relevant and more informed with respect to the search for qualified judges than is the politics of the established party organizations in any part of the state. Politics will be out of the plan in the usual, and irrelevant, context of judicial office viewed as a well-deserved reward for party loyalty and political labors.

There is another safety valve in the proposed plan which further ensures that qualified men will be our judges. The proposal provides for an Illinois Courts Commission consisting solely of laymen and lawyers, that is, three of the former and four of the latter. The Governor is to appoint the lay members, limiting members of the same political party to no more than two positions on the Commission. The lawyers are to be nominated by representatives of the judicial nominating commissions, with the Governor to make the selection from eight nominees submitted to him. Alternatively, if the General Assembly so provides, the lawyers of the State will elect the

lawyer members. The Commission will be permanently convened, with power to initiate and receive complaints, investigate, hold public hearings and, where warranted, remove, suspend, censure, or retire particular judges. The broad powers and the independence of this commission provide a greater assurance than Illinois has previously had that its judges' conduct will be examined continuously by an effective watchdog commission.

The Needs of the '70s and Beyond

As our modern world changes in faster and more complicated ways, the conflicts our judges are called upon to resolve seem to become more compelling and more complex. We need men of courage and vision on the bench—men who are acutely aware of the changes taking place in our society, yet who also realize the enduring worth of the basic principles of our legal system. We need men who will apply these principles to our conflicts, and who will themselves embody our highest ideals of judicial sagacity and probity.

Many lawyers and laymen have expressed surprise that some of the recent disclosures of judicial impropriety have rested fairly easily on a comfortable bed of public cynicism. One wonders whether this cynicism has been bred by a widespread feeling that judicial choice at present is out of the hands of the people. Fortunately, the cynicism has lately reached such vast proportions that it has begun to turn to a renewed public demand for judicial reform. Clearly this demand was one of the prime forces which called the Constitutional Convention into being. The organized Bar and various active civic groups have not lost sight of the need for change and once again are acting to bring about the reforms the situation demands. The people of Illinois must have a new Judicial Article that will provide for the merit selection of judges—judges who will be worthy of the ideals of the people and of the needs of the 1970's and beyond.

FOOTNOTES

1. Ogilvie, "The Crisis in our Courts," 51 Chi. B. Rec. 8 (1969); Symposium, "Open Meeting on Non-Judicial Activities of Judges," 51 Chi. B. Rec. 64 (1969); Karaganis, "Who's on the Bench?", Chicago Sun-Times, September 7, 1969, §2 at 1; "Liberate the Judiciary," Chicago Sun-Times, September 7, 1969, §2 at 11 (Editorial). *See also* Acheson, "Removing the Shadow Cast on the Courts," 55 A.B.A.J. 919 (1969).

2. Statement of Supreme Court of Illinois, June 18, 1969, attached as Appendix E to Report of Special Commission of the Supreme Court of Illinois in Relation to No. 39797 *(People v. Isaacs)*, July 31, 1969.

3. Descriptions of the efforts of the organized Bar in Illinois may be found in Cedarquist, "The Continuing Need for Judicial Reform in Illinois." 4 DePaul L. Rev. 153 (1955); Jenner, Tone and Saltz, "Introduction" to Article VI, S.H.A. Const. Art. VI, at 3 (1964); Weiss, "The Judicial Article and the Role of the Bar," 44 Chi. B. Rec. 287 (1963); "Proposed Judicial Article," 41 Chi. B. Rec. 485 (1960). The support of the American Bar Association for the merit plan since 1937 is also described in these commentaries.

4. Cedarquist, "For the Proposed Judicial Article," 39 Chi. B. Rec. 109 (1957); Sears, "Judicial Selection: The Horse Before the Cart," 48 Ill. B.J. 272, 280 (1959); *see* Franklin, "Election and Tenure of Judges," 50 Ill. B.J. 691 (1962).

5. The domination of partisan judicial elections by the party slate-makers, and the voters' apathy and lack of information, have been clearly pointed out in Ogilvie, "The Crisis in Our Courts," *supra* note 1, at 9-10; Sears, "Judicial Selection," *supra* note 4, at 277; Winters and Allard, "Two Dozen Misconceptions about Judicial Selection and Tenure," in Judicial Selection and Tenure 130, 132 (Winters ed. 1967). The President's Commission on Law Enforcement and the Administration of Justice, in its report The Challenge of Crime in a Free Society (1967) observed:

"In our largely urban society where

only a small portion of the electorate knows anything about the operation of the courts, it is usually impossible to make an intelligent choice among relatively unknown candidates for the bench. The inevitable result is that in partisan elections the voters tend to follow their party's nominations without any serious attempt to evaluate the relative merits of the candidates." Judicial Selection and Tenure, *supra,* at 174.

6. The significance of the Governor's role was described in Joint Committee on Judicial Article, "Explanatory Statement on the Proposed Judicial Article" 81 (1953):

> "The governor is made responsible for the initial appointment of judges. In this way, the responsibility is clearly placed on one person whose performance can be watched by the people and whose successes or failures therein can be judged by the voters at the elections for governor."

7. Winters, "One Man Judicial Selection," in Judicial Selection and Tenure, *supra* note 5, at 122-23.

8. A recent survey of the political backgrounds of the judges of the Circuit Court of Cook County vividly proves the point. Karaganis, "Who's on the Bench?", *supra* note 1.

9. The defeat of Judge Marion Waltner of Kansas City Missouri on a retention vote in 1942 is described in Watson and Downing, The Politics of the Bench and the Bar 226-29 (1969).

10. A thorough study of the operation of the merit plan in Missouri since 1940 contains this finding:

> "One consequence of the Plan on which there has been general agreement by the Bar is that it results in putting better judges on the bench than are usually chosen under an elective system."

Watson and Downing, The Politics of the Bench and the Bar, *supra* note 9, at 345. This study provides objective support to the "general agreement" by the Missouri Bar. A recent description of the operation of the merit plan in a number of other jurisdictions may be found in Address by G. R. Winters, "The Missouri Plan," Younger Members Section Meeting, Illinois State Bar Association, January 30, 1970 (Shortly to be published in Illinois Bar Journal).

APPENDIX

PROPOSED JUDICIAL ARTICLE VI

(Proposed Provisions)

SECTION 10.

SELECTION AND TENURE OF JUDGES.

All judges shall be appointed by the Governor from nominees submitted by Judicial Nominating Commissions, constituted as provided in Section 11, and may seek retention in office as provided in this Section. The General Assembly may provide by law for a different system of selection and tenure, but no such law shall be adopted except by vote of two-thirds of the members elected to each House, nor shall it become law until first submitted to the electors at the next general election and approved by a majority of those voting on the question.

(a) Whenever a vacancy occurs in the office of judge, the administrative director shall notify the chairman of the appropriate Judicial Nominating Commission, who shall forthwith convene the Commission. Within 56 days after receipt by the chairman of the notification, the Commission shall submit to the Governor a list containing the names of three persons qualified for the office. If two or more vacancies on the same court are to be filled, the number of names on the list shall be three times the number of vacancies. If the Supreme Court upon recommendation of the Commission shall determine that the number of qualified persons available is fewer than three times the number of vacancies, the names of those available shall be listed. The Governor, immediately upon receipt of the list, shall make it public and, within 28 days after receipt of the list, shall appoint from the list one person to fill each vacancy. If an appointment is not made by the Governor within the 28 days, the Supreme Court shall promptly make the appointment from the list.

(b) A judge appointed to fill a vacancy shall serve an initial term ending on the first Monday in December following the next general election held after he has completed one year in office. He may at that general election stand for retention in office as hereinafter provided.

(c) Not less than six months prior to the general election next preceding the expiration of his term of office, any judge previously elected or appointed may file in the office of the Secretary of State a declaration of candidacy to succeed himself, and the Secretary of State, not less than 63 days prior to the election, shall certify the judge's candidacy to the proper election officials. At the election the name of each judge who has filed a declaration shall be submitted to the voters, on a special judicial ballot without party designation, on the sole question whether he shall be retained in office for another term. The elections shall be conducted in the appropriate judicial districts, circuits and counties. The af-

firmative votes of a majority of the voters voting on the question shall elect him to the office for a full term commencing the first Monday in December following the election. Any judge who does not file a declaration within the time herein specified, or, having filed, fails of retention, shall vacate his office on the first Monday in December following the general election, whether or not his successor shall yet have qualified.

(d) If an incumbent does not file a declaration of candidacy within the time specified above, the selection and appointment of his successor, if any, shall proceed immediately in a manner similar to that above provided in this Section so that the successor may take office as soon as the vacancy occurs.

(e) The office of any judge shall be deemed vacant upon his death, resignation, retirement, removal, or upon the conclusion of his term without retention in office. Whenever an additional judge is authorized by law, the office shall be filled in the same manner as in the case of a vacancy.

(f) Any law reducing the number of judges of the Appellate Court in any district or the number of Circuit judges in any circuit shall be without prejudice to the right of judges in office at the time of its enactment to seek retention in office as hereinabove provided.

(Proposed Provisions)

SECTION 11.
JUDICIAL NOMINATING COMMISSIONS.

There shall be Judicial Nominating Commissions in each Judicial District, and in each Circuit, for nomination of judges for the Supreme Court, Appellate Court, and Circuit Courts, as follows:

(a) The Circuit Judicial Nominating Commission for each Circuit outside the First Judicial District, to make nominations for Circuit Court judges in each respective circuit, shall consist of six laymen, no more than three of whom shall be members of the same political party, and five lawyers.

(b) The District Judicial Nominating Commission for each judicial district other than the First Judicial District, to make nominations for Appellate and Supreme Court judges from each respective district, shall consist of two lawyers and two laymen from each Circuit Judicial Nominating Commission within the district, elected by each Circuit Commission, and an additional lay member appointed by the Governor from any Circuit Commission within the district.

(c) The First District Judicial Nominating Commission, to make nominations for the Circuit. Appellate and Supreme Court judges from the District, shall consist of eleven laymen, no more than six of whom shall be members of the same political party, and ten lawyers.

(d) The lay members of each Circuit Commission and of the Commission for the First Judicial District shall be appointed by the Governor. The Governor shall designate one of the lay members of each Commission as chairman. The chairman may vote only in case of a tie. The term of any chairman shall be three years unless his remaining term as a member of the Commission expires sooner. The lay members shall reside in the Circuit or District for which they are appointed.

(e) The lawyer members of each Circuit Commission and of the Commission for the First Judicial District shall be chosen by secret ballot by the members of the Bar whose principal offices are in the appropriate circuit, in such manner as shall be provided by rules which shall be adopted by the Supreme Court. The lawyer members shall reside in the Circuit or District for which they are chosen.

(f) In appointing the initial members of each Commission, the Governor shall divide the lay appointees into two groups and shall designate one group to serve for three years and one to serve for six years. As near as may be, the groups shall be equal and the number of members of one political party shall not exceed half the number of the group. The initial lawyer members shall be divided into two groups equal as near as may be, in such manner as the Supreme Court shall provide, one group to serve for three years and one to serve for six years. Thereafter the terms of all members shall be six years.

(g) A vacancy in the office of chairman or member of the Commission shall be filled for the unexpired term in the same manner and subject to the same qualifications as those originally chosen.

(h) No person who holds any office under, or is an employee of, the United States or this State or any municipal corporation or political subdivision of this State or who holds any official position in a political party is eligible to serve on a judicial nominating commission. Compensation for service in the State militia or the armed forces of the United States for such periods of time as may be determined by rule of the Supreme Court shall not be considered compensation. No member of a judicial nominating commission may be nominated or appointed to judicial office for a period of three years from the last day of his service on the commission. A member, having served a full term of six years on a commission, may not be selected to serve on a commission during the next three years.

(i) Members of commissions shall not receive any compensation for their services but shall be entitled to reimbursement for necessary expenses. The General Assembly shall appropriate funds to the Supreme Court for such reimbursement and for other administrative expenses of the commissions. The commissions may conduct such investigations, and employ such staff members as may be necessary to perform their duties.