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## The Judicial Article: What Went Wrong?

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*Guest Speaker; Delegate to 1972 Constitutional Convention*

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# JUDICIARY

## THE JUDICIAL ARTICLE: WHAT WENT WRONG?\*

Jean M. Bowman\*\*

### I. INTRODUCTION

The judicial article of the 1972 Montana Constitution has been said to be the worst such article in the fifty state constitutions,<sup>1</sup> and few would disagree that it failed to improve Montana's judicial system. This paper will address the question of how the judicial article came to be, show that it really is no better and not much different than the 1889 article, and offer some suggestions for improvement.

### II. HOW THE JUDICIAL ARTICLE CAME TO BE

#### A. *Background*

When the 100 delegates elected to the constitutional convention gathered in Helena in late November 1971 to caucus, elect officers, and receive committee assignments, a mood of change was in the air. A plethora of information had been made available to all candidates who were not eliminated in the primary election in September. Most of the delegates were convinced that the 1889 Con-

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\* This paper was presented as part of the Judiciary Panel at the *Constitutional Symposium '89*, November 17, 1989. Members of the panel included Gordon Bennett, moderator, Jean M. Bowman, George Dalthorp, Frank Haswell (deceased), Joseph Mazurek, James Sorte, The Honorable Chief Justice Jean Turnage.

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1. J. LOPACH, *WE THE PEOPLE OF MONTANA* 150 (1983) [hereinafter *WE THE PEOPLE OF MONTANA*].

stitution was generally antiquated, filled with intricate statutory detail, biased in favor of mining interests, and should be extensively revised.

All the delegates indicated their first choice of committee assignment which almost all received, with no delegate being assigned to more than one substantive committee. Although delegates were elected on a partisan ballot, considerable sentiment throughout the convention existed to organize it as a *bipartisan* effort. For instance, seating was alphabetical rather than by party as it is in the legislature. Moreover, the delegates convinced President Leo Graybill, a democrat, to appoint both democrats and republicans to chair committees, and to appoint a person from the opposite party as the vice-chairperson to ensure a bi-partisan effort.

Committees included delegates with various philosophical viewpoints, whenever possible. For example, the legislative committee included delegates who favored a unicameral legislature and those who supported a bicameral legislature. Members of the judiciary committee included delegates who favored only minor, cosmetic changes in the 1889 article and those who were dedicated to completely rewriting the judicial article. Perhaps, because of this, no time was spent by the committee defining goals or discussing the kinds of improvements anticipated. Part of this resulted from the fact that few people in 1972 contemplated the degree of change necessary to establish an effective judicial "system."<sup>2</sup> The lack of a proposal to restructure the judicial branch into a system underlines this point.

Rather than restructure the judicial article into a coherent system, most people, including many of the delegates, wanted to

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2. A proposed judicial article, "The Montana Plan," developed over a period of five years, by "The Montana Citizens Conference for Court Improvement," was presented to the judiciary committee. This plan generated much interest and controversy during its developmental stages and during the Convention. At least fifteen people testified in favor of the Plan, including the president of the Montana Bar Association, the Chief Justice of the Montana Supreme Court, a Montana Federal District Judge, and two Montana District Court Judges. At least eight people testified against the Plan, including two Montana District Court judges. Fully one-third of the people testifying before the judiciary committee testified on the Plan. Yet, the plan, as an entity, was not seriously considered as a viable alternative to the 1889 CONSTITUTION. See I MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS, 533-36 (1979) [hereinafter TRANSCRIPTS] for names of witnesses heard by the committee. The plan provided for a unified court system, with administrative machinery to secure coordinated and efficient operation, merit selection of judges, and flexibility. See generally Muckelston, *The Judiciary: Constitutional Convention Study, No. 14*, 324 (1972) [hereinafter Muckelston]. For a discussion of the merits of the Montana Plan and its contents see Mason & Crowley, *Montana's Judicial System—A Blueprint for Modernization*, 29 MONT. L. REV. 1 (1967) [hereinafter *Montana's Judicial System*].

maintain the *status quo*, and hence preserve their constitutionally protected interest. Testimony from the public included proposals to retain the clerks of the district court and the clerk of the supreme court as constitutional offices,<sup>3</sup> to retain the constitutional status of justices of the peace,<sup>4</sup> to continue *partisan* elections of supreme court justices,<sup>5</sup> and to appoint supreme court justices.<sup>6</sup>

### B. Two Proposals

Because the nine-member committee split five to four in favor of only minor changes, two proposals came out of the committee.<sup>7</sup> Chairman of the committee, David Holland, opened the convention debate of the judicial article with an explanation of the changes made by the majority.<sup>8</sup> He highlighted the differences between the majority and minority proposals, emphasizing that the majority plan provided for judges to be elected,<sup>9</sup> justices of the peace to retain their constitutional status,<sup>10</sup> and for the clerk of the supreme court to continue as an elected constitutional office. These proposed changes must be deemed cosmetic, except for the election of judges, and none of them in any way addressed the creation of a judicial "system." Delegate Ben Berg presented the minority proposal,<sup>11</sup> which the delegates voted to debate.

The judicial article adopted by the convention provided neither the framework for a judicial "system," nor does it provide for merit selection of the judiciary. The reasons for this are varied. There was lack of support for the minority's attempt to establish a

3. *Id.* at 534 (witnesses included Opal Eggert, Ken D. Clark, Thomas J. Kearney, Roger Barnaby, and Hardin E. Todd). The clerk of the supreme court remains as an elected official but the clerk's position no longer retains its previous constitutional status. IV TRANSCRIPTS, *supra* note 2, at 1127-29.

4. *Id.* at 534-36 (witnesses included Opal Eggert, Sterling DePratu, Ken D. Clark, Walter Hammermeister, Joe Roberts, Harold McChesney, Paul Keller, and Robert Brooks). See also *infra* text accompanying notes 38-41.

5. *Id.* at 534 (Francis Mitchell testified in "favor[] [of] partisan election of supreme court justices and left the design of the court system to the supreme court).

6. *Id.* at 535 (John Mudd).

7. Members of the judiciary committee were David Holland, chairman, democrat, Butte; Catherine Pemberton, vice-chairman, republican, Broadus; Ben Berg, republican, Bozeman; Cedor Aronow, democrat, Shelby; Jean Bowman, republican, Billings; Leslie Eskildsen, democrat, Malta; Rod Hanson, democrat; Fairfield; Mason Melvin, democrat, Bozeman; and John Schiltz, democrat, Billings. The majority included Holland, Aronow, Eskildsen, Hanson, and Schiltz. The minority included Pemberton, Berg, Bowman, and Melvin.

8. IV TRANSCRIPTS, *supra* note 2, at 1011-17.

9. *Id.* at 1013-14.

10. *Id.* at 1127.

11. *Id.* at 1018-25.

unified court "system."<sup>12</sup> Many delegates feared granting too much authority to the supreme court.<sup>13</sup> Finally, there was uncertainty about the legal effect of the terms "supervisory control,"<sup>14</sup> "administrative control,"<sup>15</sup> and "final appeal."<sup>16</sup> In sum, there was no consensus about what needed to be changed or why. From this, two ironies developed. The first is that, although the convention voted to debate the minority report, rather than the majority report, much of the majority report actually was adopted by amendments offered during debate. The second is the lack of major substantive change from the 1889 Constitution, despite the conviction of many to the contrary.

### III. WHAT CHANGES DID THE CONVENTION MAKE?

#### A. Powers That Remained the Same

Before understanding what changes the convention made, it is necessary to examine what provisions the convention retained from the 1889 Constitution. One such provision, and possibly the most important, is the jurisdiction conferred on the court. The supreme court continues to have both appellate jurisdiction and original jurisdiction to issue certain writs.<sup>17</sup> Furthermore, despite tremendous efforts to delete the words "general supervisory control" from the proposed constitution, the delegates eventually conceded such power to the court.<sup>18</sup> This power historically has manifested itself principally through the writ of supervisory control. Critics of the writ have stated that the drafters of the 1889 Constitution never "contemplate[d] integral, continuous administrative control or supervision by the supreme court of lower state courts."<sup>19</sup> Since its origin in *State ex rel Whiteside v. District Court*,<sup>20</sup> the court has used supervisory control when no route of appeal exists (often interlocutory appeals) or the remedy available on appeal is inadequate.<sup>21</sup> Also, the court has used supervisory control to guide the

12. *Id.* at 1041.

13. *Id.* at 1042; *Id.* at 1038; *Id.* at 1041; *Id.* at 1072; *Id.* at 1073.

14. *Id.* at 1039-43.

15. *Id.* at 1041-43.

16. *Id.* at 1037, 1073.

17. MONT. CONST. art. VII, § 2.

18. IV TRANSCRIPTS, *supra* note 2, at 1039-41. Similarly, jurisdiction of the district courts remains the same, except that appeals from inferior courts are heard "as trials anew unless otherwise provided by law." MONT. CONST. art. VII, § 2(2).

19. See generally, *Montana's Judicial System*, *supra* note 2, at 1.

20. 24 Mont. 539, 63 P. 395 (1900).

21. *State ex rel. Hall v. District Court*, 109 Mont. 228, 95 P.2d 438 (1939); *State ex rel. Forsyth v. District Court*, 216 Mont. 480, 701 P.2d 1346 (1985); *State ex rel. Greeley v.*

course of litigation in lower courts in specific cases,<sup>22</sup> to apportion caseloads among district judges in multi-judge districts,<sup>23</sup> and to compel district judges to perform their judicial duties.<sup>24</sup>

Despite the minority's attempt to grant the supreme court "administrative control over all courts,"<sup>25</sup> this expansion of authority was rejected by the convention. Delegate Berg argued that the supreme courts of all but thirteen states had administrative powers, and that he envisioned the locus of this administrative authority to rest with the office of the clerk of the supreme court.<sup>26</sup> After several amendments the minority proposal lost much of its original vigor,<sup>27</sup> specifically the delegates deleted the "judicial administration" provision.<sup>28</sup> The new constitution, however, does grant the supreme court the authority to "make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members."<sup>29</sup>

### B. Terms, Organization and Qualifications

Even though the 1889 Constitution provided for an increase in the number of supreme court justices,<sup>30</sup> the convention delegates debated extensively over the inclusion of such a provision in the new constitution.<sup>31</sup> Arguments to do away with this prerogative ranged from fear that the legislature would "pack the court and . . . influence it with the political philosophy of a Legislature"<sup>32</sup> to advanced age of the "judges."<sup>33</sup> However, the strongest arguments were economic—delegates feared the costs of a seven-member court.<sup>34</sup> Ultimately, the minority proposal which gave to the legis-

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Water Court, 214 Mont. 143, 691 P.2d 833 (1984); *State ex rel. Greeley v. District Court*, 180 Mont. 317, 590 P.2d 1104 (1979); *State ex rel. Leavitt v. District Court*, 172 Mont. 12, 560 P.2d 517 (1977). Recently, the supreme court granted the petition for a writ of supervisory control to resolve a constitutional dispute concerning the rights of Montana citizens to elect its judiciary under the Montana Constitution. See *State ex rel. Racicot v. District Court*, \_\_\_ Mont. \_\_\_, \_\_\_, \_\_\_ P.2d \_\_\_, \_\_\_, 47 St. Rptr. 961, 963, 1990 Mont. Lexis 157 (1990).

22. *State ex rel. Regis v. District Court*, 102 Mont. 74, 55 P.2d 1295 (1936).

23. *State ex rel. Magnuson v. District Court*, 125 Mont. 79, 231 P.2d 941 (1951).

24. *State ex rel. Bennett v. Bonner*, 123 Mont. 414, 214 P.2d 747 (1950).

25. Judiciary Committee: Minority Proposal, § 7 reprinted in I TRANSCRIPTS, *supra* note 2, at 510.

26. IV TRANSCRIPTS, *supra* note 2, at 1021.

27. *Id.* at 1024-43.

28. *Id.* at 1041-43.

29. MONT. CONST. art. VII § 2(3).

30. MONT. CONST. of 1889, art. VIII, § 5.

31. IV TRANSCRIPTS, *supra* note 2, at 1045-46.

32. *Id.* at 1045 (Delegate McNeil speaking).

33. *Id.* (Delegate Arness speaking)

34. *Id.* at 1046 (Delegate Romney speaking).

lature the authority to increase the size of the supreme court from five-to-seven prevailed.<sup>35</sup>

During the convention, delegates also took the opportunity to scrutinize the term of judicial officers and the necessary qualifications for the offices. They chose to increase the terms of district judges from four to six years. Similarly, the delegates extended by two years the term of supreme court justices from six to eight. As for qualifications, the new constitution changed the previous requirements. The age requirement was eliminated while the experience requirement was increased. No longer would the mere admittance to practice law suffice as a condition to hold a judicial office,<sup>36</sup> because the new constitution would require a nominee or candidate for judicial office to have been admitted to the practice of law in Montana for at least five years.<sup>37</sup>

The retention of justice-of-the-peace courts as courts of constitutional status evoked great controversy. The minority report de facto excluded them by providing, "The judicial power of the state is vested in a supreme court and district courts and such other courts as may be provided by law."<sup>38</sup> On a motion for reconsideration,<sup>39</sup> the convention delegates voted forty-five to forty-two to hear debate on their retention. Opponents and proponents alike debated at length the merits of what status the courts should have, and finally the justice-of-the-peace courts were retained by a fifty-three to forty-five vote.<sup>40</sup> A noteworthy change from the 1889 Constitution, which accompanied their inclusion, however, was the concomitant direction that the legislature provide "qualifications, training, and monthly compensation."<sup>41</sup>

### C. Selection

The Judiciary Committee split most sharply on the issue of how judges should be selected. The 1889 Constitution provided simply that justices of the supreme court were elected "by the electors of the state at large,"<sup>42</sup> and district court judges were elected

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35. MONT. CONST. art. VII, § 6(2). In 1979, the legislature used this provision to increase the number of justices from five-to-seven, but this enactment remains a temporary provision which must be reauthorized every eight years. See 1979 Mont. Laws 683 § 5 (codified at MONT. CODE ANN. § 3-2-101 (1989)).

36. MONT. CONST. of 1889, art. VIII, § 10.

37. MONT. CONST. art. VIII, § 9(1).

38. I TRANSCRIPTS, *supra* note 2, at 40.

39. V TRANSCRIPTS, *supra* note 2, at 1154.

40. *Id.* at 1161.

41. MONT. CONST. art. VII, § 6.

42. MONT. CONST. of 1889, art. VIII, § 6.

by the voters in their districts.<sup>43</sup> Clearly, section 8, selection, in the 1972 Constitution, is a change from that simple directive; it is also the section most in need of revision because it bungles the method of selection process. It provides for neither pure election nor merit selection and, at best, constitutionalizes uncertainty in the constitution in the method of selection.

Prior to the convening of the convention, the Montana Legislature attempted at least five times to provide for merit selection of judges. The first attempt, in 1945, was thrown out by an "unfavorable committee report;"<sup>44</sup> the effort in 1957, to provide merit selection of supreme court justices only, was defeated along party lines, forty-six to forty-four.<sup>45</sup> Other attempts were made in 1959, 1967, and 1969.<sup>46</sup> Therefore, in 1972 the delegates confronted whether to install a merit-based, judicial-selection process; as in the legislature, the primary argument against doing so was that it was undemocratic.<sup>47</sup>

In defending the selection of judges, Delegate Berg said that Montanans should never "divorce the judiciary from the electorate."<sup>48</sup> He did not argue that this consideration was predicated on the premise that it would result in a better, more responsible judiciary. Rather, by playing both sides of the election/selection issue, he anticipated both sides' support. Voters who favored electing judges would be appeased by the voting mechanism while those voters favoring a selection system based on merit would be satisfied by providing for an initial screening before an appointment to fill a vacancy. Berg prevailed. The article as adopted by the convention and later the electorate provides for a two-tiered selection process: the governor first nominates a person to fill a vacancy subject to senate confirmation, then the judge is subject to approval or rejection at the next election after confirmation.<sup>49</sup>

In practice, however, the belief that we have not divorced the judiciary from the electorate is somewhat hollow. Statistics show that between 1889 and 1977, forty-seven percent of Montana's district judges and thirty-nine percent of the supreme court justices initially were appointed by the governor. Most of those appointed retained their position by uncontested elections, supreme court justices having faced more elective competition for their seats after

43. MONT. CONST. of 1889, art VIII, § 12.

44. Muckelston, *supra* note 2, at 148.

45. *Id.* at 149.

46. *Id.* at 149, n.101 at 232.

47. *Id.* at 149.

48. IV TRANSCRIPTS, *supra* note 2, at 1023.

49. MONT. CONST. art. VII, § 8.



their initial appointment than have district court judges. In those instance when there was a contest, incumbents most often have won by large margins.<sup>50</sup>

To understand why section 8 fails so miserably, one needs to understand what transpired during the Constitutional Convention when adopting it, and what merit selection is. Merit selection evolved in the several states after appointment and election systems of naming a judiciary became politically unpopular. In 1940, Missouri became the first state to adopt a merit selection system. The so-called Missouri Plan, or Merit Plan, has three elements which combine "aspects of both the appointive and elective systems."<sup>51</sup>

1. Judicial candidates are nominated by non-partisan lay-professional nominating commissions;

2. An appointment is made by the chief executive;

3. Provision is made for voters to review the judge's performance at the polls.<sup>52</sup>

The minority proposal originally had provided for a contested election of an appointed judge only at the first election following appointment. At all subsequent elections the appointed judge would run on a "yes-no" retention vote.<sup>53</sup> This is a variation on the standard merit selection process, which generally provides that an incumbent run on his record at all elections subsequent to his appointment.

Delegate Melvin, a member of the minority of the judiciary committee, moved to insert "and at the primary election prior to each succeeding term of office" in place of "thereafter, the elected judge shall be subject to approval or rejection in a general election for each succeeding term in office."<sup>54</sup> Speaking for the amendment, Melvin said,

[It] open[s] up all primary elections. Not only that, but it's going to widen the horizon for the voters. It gives them an opportunity to vote in primary elections on the persons who have filed for the district judge, and then . . . you'll see that it provides the voters a choice—either between two candidates or, if there's only one candidate running, then rejection or approval of that incumbent

50. WE THE PEOPLE OF MONTANA, *supra* note 1, at 151-58. Interestingly, the number of competitive elections has declined now that the elections have become non-partisan. *Id.*

51. Muckelston, *supra* note 2, at 143-44. Many states, which have a merit plan for selection, do not employ all three features of the plan. *Id.*

52. *Id.*

53. Judiciary Committee: Minority Proposal, § 7 reprinted in I TRANSCRIPTS, *supra* note 2, at 510-11.

54. IV TRANSCRIPTS, *supra* note 2, at 1085.

candidate.<sup>55</sup>

Even though Melvin argued his amendment assured that an incumbent could not be elected by receiving only one vote, it does not in fact do so. By adopting this amendment, however, the convention did alter significantly the original purpose of the section, which was judicial retention or rejection by a "yes-no" vote—a regrettable result.<sup>56</sup>

Moreover, the term "incumbent" did not appear in the minority proposal offered originally to the Convention. As presented for debate, proposed section 8 provided "the name of the *appointed* judge shall be . . . on a . . . ballot [and] . . . [i]f there is no primary election contest for the office, the name of the *appointed* judge shall [be placed on the ballot during the] general election . . . ."<sup>57</sup> Delegate Melvin as part of his prior amendment moved to amend the proposal by striking "appointed" and inserting "incumbent."<sup>58</sup> Although Melvin did not speak to this part of his amendment, the change, apparently, was recognized as carrying out the intent of the minority, and eventually prevailed.<sup>59</sup>

The amendment, however, has caused ambiguity as to the meaning of the clause. As a result of this ambiguity, the Montana Supreme Court in *Keller v. Smith*<sup>60</sup> was presented the question of whether an incumbent judge is one who has been nominated and selected, as provided by the 1972 Constitution, or whether it also includes those who occupied judicial office prior to the new constitution's ratification and therefore had never been confirmed by the senate.<sup>61</sup> The court defined incumbent as "a person who is in present possession of an office.' It is not limited, qualified or restricted by the method by which one attained the office."<sup>62</sup> A careful reading of the case shows that the court easily could have found otherwise than it did. Had it done so, the judicial article would have yet another flaw.

A second case brought to clarify the meaning of incumbent, *Yunker v. Murray*,<sup>63</sup> centered around judicial departments in the

55. *Id.* at 1086.

56. *Id.* at 1089 (Chairman Graybill explaining effect of amendment).

57. Judiciary Committee: Minority Proposal, § 7 reprinted in I TRANSCRIPTS, *supra* note 2, at 510-11 (emphasis supplied).

58. IV TRANSCRIPTS, *supra* note 2, at 1085.

59. *Id.* at 1103.

60. 170 Mont. 399, 553 P.2d 1002 (1976).

61. *Id.* at 403, 553 P.2d at 1005.

62. *Id.* at 405, 553 P.2d at 1006 (quoting in part BLACK'S LAW DICTIONARY 908 (4th ed. 1951)).

63. 170 Mont. 427, 554 P.2d 285 (1976).

thirteenth judicial district in Yellowstone County. In 1961, the legislature provided that each judgeship in a multiple judge district was to be assigned a number and would become a separate judicial office.<sup>64</sup> Due to clerical error, the judges in the thirteenth district were shown in the court records in Yellowstone County as being assigned to one department, but were given a different department number by the secretary of state. Thus, at election time in 1976, each judge decided to file according to the department over which he presided as reflected in the court records, and each filed in a different department than the one in which he had been elected previously. It was argued that no one was an incumbent; therefore, no one had to face a "yes-no" vote. The court did not agree, however, and protected the intent of the constitution, stating that the convention delegates did not intend to nullify the "retain or reject" ballot by allowing filing for different district judgeships within the same judicial district.<sup>65</sup>

As suggested by these cases, a resistance to the provision that judges be subjected to a "yes-no" retention vote remained in Montana during the first few years after the 1972 Constitution's ratification. The decisions, however, have laid this argument to rest, unlikely to be resurrected with any success.

In at least one other case, *Jones v. Judge*,<sup>66</sup> the court again helped clarify the meaning of article VII, section 8. The court said vacancies in the Montana Supreme Court, including that of chief justice, were to be filled in the same manner as district court vacancies.<sup>67</sup> Thus, the intention of the convention that *all* judicial vacancies be filled by appointment, senate confirmation, and a "yes-no" vote, unless the candidate is opposed, has been upheld.

In addition to the court cases cited above, the ambiguities in section 8 have been addressed at least three times by the attorney general.<sup>68</sup> A 1987 Attorney General's Opinion,<sup>69</sup> states that the constitution requires that an individual appointed to the office of district judge must be confirmed by the senate before the judge's name can be placed on the ballot at a subsequent election.<sup>70</sup> It was

64. MONT. CODE ANN. § 3-5-403(2) (1989).

65. *Yunker*, 170 Mont. at 434, 554 P.2d at 289.

66. 176 Mont. 251, 577 P.2d 846 (1978).

67. *Id.* at 252, 577 P.2d at 847.

68. 42 Op. Att'y Gen. 31 (1987); 41 Op. Att'y Gen. 52 (1986); 37 Op. Att'y Gen. 115 (1978).

69. 42 Op. Att'y Gen. 31 (1987).

70. The Montana Supreme Court recently upheld the interpretation of the attorney general in *State ex rel. Racicot v. District Court*, \_\_\_ Mont. \_\_\_, \_\_\_ P.2d \_\_\_, \_\_\_, 47 St. Rptr. 961, 970, 1990 Mont. Lexis 157 (1990). In *Racicot*, the court held "that a judicial nominee need not stand for election until the next election after the Senate's confirmation

the intention of the convention that senate confirmation be an added check on the governor's appointment powers.<sup>71</sup> However, the constitution as ratified, provided for annual legislative sessions guaranteeing senate confirmation proceedings within a year of the judicial appointment. Because of a constitutional amendment in 1974 that reinstated bi-annual sessions, senate confirmation of gubernatorial appointments may now be as long as two years from the time of the appointment. This extension of time before senate confirmation does not alter the intent of the provision, nor does it change the date upon which a term begins or ends.<sup>72</sup> It does, however, prolong the element of uncertainty in the selection process.

Although such an occurrence is unlikely, section 8 makes it possible to keep the names of judicial candidates off the ballot forever. The attorney general has said a judge who is confirmed by the Senate after the filing date for the primary election does not have to run in the fall general election. The judge must file for reelection at the primary two years hence.<sup>73</sup> If the judge were to resign prior to the next filing date, a vacancy would occur, which would be filled by the selection and nomination process, that is, someone would be appointed. Therefore, an incumbent can control the method of selection by choosing *not to run* in the primary.

#### D. Removal and Discipline

A section on removal and discipline appeared in the minority proposal, with much detail, including a grant of authority to the Judicial Standards Commission to censure practicing members of the bar. Delegate Aronow successfully offered an amendment that completely superceded the minority proposal,<sup>74</sup> and which was later adopted.<sup>75</sup> Although the bulk of the language in article VII, section 11 remains from Delegate Aronow's amendment, the voters have twice amended the provision. In 1980, a constitutional amendment changed the absolute confidentiality of the proceedings to confidentiality subject to legislative prescription. As adopted, section 11, subsection (2) provided, "The commission shall investigate complaints, make rules implementing this section, and *keep its proceedings confidential*. It may subpoena witnesses

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of the nominee." *Id.* at —, — P.2d at —, 47 St. Rptr. at 970, 1990 Mont. Lexis 157 (1990).

71. IV TRANSCRIPTS, *supra* note 2, at 1085.

72. 42 Op. Att'y Gen. 31 (1987).

73. 41 Op. Att'y Gen. 52 (1986).

74. IV TRANSCRIPTS, *supra* note 2, at 1122-23.

75. *Id.* at 1127.

and documents.”<sup>76</sup> The 1980 amendment weakened the section by granting a legislative check on the commission’s authority to make its own rules concerning confidentiality by removing the phrase, “keep its proceedings confidential” from subsection (2) and adding subsection (4), “The proceedings of the commission are confidential *except as provided by statute.*”<sup>77</sup> To the extent that its effectiveness depends on confidentiality, this effectiveness can be controlled by the legislature.

In *State ex rel Shea v. Judicial Standards Commission*,<sup>78</sup> the court’s interpretation of section 11 reduced significantly the effectiveness of the judicial standards commission. Subsection (3)(b) of section 11 gave the Judicial Standards Commission the power to “[c]ensure, suspend, or remove any justice or judge for willful misconduct in office, willful and persistent failure to perform [the justice’s] duties, or habitual intemperance.”<sup>79</sup> Based on this authority, the Judicial Standards Commission notified Justice Daniel Shea that as a result of a preliminary investigation of charges made against him, the commission found, among other things, that “[he had] acted contrary to Canons 4 and 19 of the Canons of Judicial Ethics, resulting in ‘conduct prejudicial to the administration of justice that brings the judicial office into disrespect.’”<sup>80</sup>

The court said the constitution limited its power to act in matters of judicial discipline to only those instances specifically enumerated. The allegation against Justice Shea exceeded that scope. To further support its decision, the court focused on language from the convention transcripts that demonstrated our provision had been primarily modeled after the laws of New Mexico with some portions “taken out of California.”<sup>81</sup> At that time, however, New Mexico statutes did not mention “conduct prejudicial to the administration of justice that brings the judicial office into disrepute” as an act worthy of judicial censure.<sup>82</sup> The court concluded from this that the delegates must have intended to limit the grounds upon which the Judicial Standards Commission might act

76. MONT. CONST. art. VII, § 11 (amended 1980) (emphasis added).

77. MONT. CONST. art. VII, § 11 (1980) (emphasis added).

78. 198 Mont. 15, 643 P.2d 210 (1982).

79. MONT. CONST. art. VII, § 11(3)(b) (amended 1984).

80. *Shea*, 198 Mont. at 18, 643 P.2d at 212.

81. *Id.* at 28, 643 P.2d at 212; see also IV TRANSCRIPTS, *supra* note 2, at 1123 (delegate Aronow successfully offering an amendment to the minority proposal).

82. *Shea*, 198 Mont. at 28, 643 P.2d at 217. If delegate Aronow was clearer as to what portion of his amendment he was drawing from California, the court may have reached an opposite result. The CALIFORNIA CONSTITUTION at that time did include “conduct prejudicial to the administration of justice that brings the judicial office into disrepute” as an act resulting in judicial censure. *Id.* at 28, 643 P.2d at 217 (quoting CAL. CONST. art. VI, § 18(c)).

to those available in the New Mexico model.<sup>83</sup>

The probability is remote that more than a handful of delegates knew what the New Mexico statutes and the California Constitution said. If they did know, it is doubtful they had carefully considered the ramifications of patterning the proposal after one state, rather than the other. Delegate Aronow did not make the distinction on the floor. He merely said the section was patterned after New Mexico and California. The convention did intend for the Judicial Standards Commission to be relatively independent from either the judiciary or the legislature. This independence was important in order to give both the public and the bar the opportunity to bring a complaint about a member of the judiciary with optimum chance to be heard. The Convention also wanted to afford members of the judiciary the chance to be censured, or removed, when necessary, without undue publicity, which could reflect unfavorably on the individual and the judiciary.<sup>84</sup>

In response to the *Shea* decision, the electorate amended subsection (3)(b) in 1984 to include specifically the "*violation of canons of judicial ethics adopted by the supreme court of the state of Montana.*"<sup>85</sup> This language gave authority to the supreme court which it lacked prior to the *Shea* decision: the authority upon recommendation of the commission to censure, suspend, or remove any justice or judge for violation of the canons of judicial ethics adopted by the supreme court. The 1984 amendment restores some of the independence the Convention envisioned for the commission, but not all of it.

## V. A PRESCRIPTION FOR THE FUTURE

Montana was at a crossroads in 1972. Change was the buzz word, and action to bring about change was much in vogue. In those areas where delegates had a clear concept of what was to be accomplished, changes were made. Those few changes in the judicial article, which are cosmetic in nature, do very little to improve the administration of justice in Montana. The major change in method of selecting judges certainly is not an improvement. The experiment for removal and discipline has been undercut by the supreme court. How can this failure be explained?

The majority of the Judiciary Committee was not committed to change. A divided committee indicated lack of direction to the

83. *Id.* at 29-30, 643 P.2d at 218.

84. IV TRANSCRIPTS, *supra* note 2, at 1126.

85. MONT. CONST. art. VII, § 11(3)(b) (1984) (emphasis added).

other delegates when the proposed article was debated on the floor. Although the convention voted to debate the minority proposal, much of the majority proposal found its way into the final document. Most of section 2 can be credited to Delegate Schiltz, member of the committee majority.<sup>86</sup> Most of section 4, district court jurisdiction, was an amendment proposed by Schiltz as well.<sup>87</sup> Sections 9 and 11 were substantially amended by Aronow, another member of the committee majority. Section 8 was extensively amended by Melvin, who was a member of the committee minority. Because there was no sense of direction and no defined goal to be achieved by writing a new judicial article, the result is an article which does not provide a cohesive judicial "system."

The fact is, many people really do not care whether judges are elected or appointed. No one, except lawyers, care whether the supreme court has supervisory control and/or administrative control. Most people do not care whether the county or the state pays the judges' salaries. People do care about having competent judges. They do care that it takes too long to get on the calendar; that too many hearings are held before the court gets to the substantive issue; that it costs too much to go to court; that litigation often appears to be a game among lawyers; that there are too many rules, or that there are not enough rules. People in court are angry, hurt, and broke. The obvious object of their frustration often is the judge. "If only there were some decent judges," they say. "They should be appointed." "They should be elected." "If only somebody would do something about the courts."

The cry to "do something about the courts" usually is not founded on the importance of having constitutionally protected justice courts or whether the Judicial Standards Commission may have its proceedings behind closed doors, or even whether there is a Judicial Standards Commission. The public's dissatisfaction with the judiciary is founded on a perception that something is wrong with the judges or the courts. Much of the frustration is due to the nature of our legal system. Society moves faster than the wheels of justice turn. The public is impatient for the law to catch up with what actually happens in the "real world." The courts are held responsible for what should be the work of the legislature. If the law does not work, it is not the law itself that is perceived to be wrong but some interpreter of the law who has corrupted and abused it.

The political realities of amending section 8, selection, to pro-

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86. IV TRANSCRIPTS, *supra* note 2, at 1081.

87. *Id.* at 1074. See also, *supra* note 18.

vide a method of selection that is less cumbersome, are dim indeed. The amendment procedure is stringent.<sup>88</sup> Voter education is difficult and expensive. The emotional issue of electing judges versus merit selection is almost certain to doom any effort in that direction. Deleting subsection (3), which provides for an election if an incumbent does not run, faces the same fate. Doing away with legislative approval of appointments does not appear likely. Moreover, it is difficult, if not impossible, to demonstrate that any of these changes would result in measurable improvement in the administration of justice in Montana.

Thus, the issue becomes the kind of change which *will* result in improvement of the administration of justice. The dissatisfaction of people with the courts, which is a manifestation of their dissatisfaction with our legal system, can be addressed through constitutional change. Such a change will be accepted, however, only when the public's perception of inadequacy in our courts has been defined or narrowed sufficiently to increase awareness that the real problem is the fact that the courts are not part of a "system." Successful organizations cannot be directed by thirty-six different managers. There must be overall direction. The courts are no different; a system is a necessity.

A "system," by definition, is a group of entities forming a unified whole.<sup>89</sup> Although no unanimity exists as to what constitutes court unification,<sup>90</sup> most authorities agree centralized administration is the key element.<sup>91</sup> Roscoe Pound, for one, advocated a unified court organization in 1940.<sup>92</sup> Arguing that unification, flexibility, conservation of judicial power, and responsibility were the controlling ideas in organization of our courts, Pound wrote:

Unification is called for in order to concentrate the machinery of justice upon its tasks, flexibility in order to enable it to meet speedily and efficiently the continually varying demands made upon it, responsibility in order that some one may always be held, and clearly stand out as the official to be held, if the judicial organization is not functioning the most efficiently that the law and the nature of its tasks permit.<sup>93</sup>

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88. MONT. CONST. art. XIV, §§ 8, 9.

89. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1971).

90. Muckelston, *supra* note 2, at 58.

91. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM: REPORT A-38 187 (1971)(available from U.S. Government Printing Office).

92. Pound, *Principles and Outlines of a Modern Unified Court Organization*, 23 J. AM. JUDICATURE SOC'Y 225-33 (1940).

93. *Id.* at 225.



In Montana, Pound's words should be followed. Montana should establish a constitutional framework which would consolidate the state courts into one cohesive system as well as a mechanism for the vesting of the system's administration within the supreme court.<sup>94</sup> One such system is outlined below.

#### SECTION I. JUDICIAL POWER

The judicial power of the state shall be vested in a unified judicial system, including an appellate court and all other courts provided by law.

#### SECTION II. APPELLATE COURT

The appellate court shall have final statewide appellate jurisdiction. It shall have original jurisdiction to issue, hear, and determine all writs appropriate to exercise its jurisdiction. *It shall have the power to administer the courts to assure fairness and efficiency.* It shall have the power to make all rules relating to the practice of law and to make procedural rules which are not inconsistent with state law.

#### SECTION III. ALL OTHER COURTS

Other courts shall have original jurisdiction in all cases arising under the laws of this state.

#### SECTION IV. JUDICIAL OFFICE

Justices and judges shall be appointed as provided by law to serve a term not less than six years.

If Montana were to adopt such a system, it would entail both flexibility and manageability. Judges could be moved freely from one district to another,<sup>95</sup> with the supreme court determining the number and boundaries of the district courts.<sup>96</sup> This stands in stark contrast to the current method that binds the district courts as county entities. Therefore, within this framework, a judicial system could be funded effectively by the state—a constant concern of lawyers and citizens alike. As Montana's population decreases or, at best, remains stable, state funding could phase out county court personnel and expenditures. Rather than continuing to have judicial districts whose political boundaries often have no relationship to geography or demographics, judicial districts could be drawn to allow more efficient use of a judge's time. Rules could be uniform. Responsibility for the "system" could be identified. Litigants would know what to expect.

Until Montana is ready for this change, the integrity of the

94. Muckelston, *supra* note 2, at 57-58.

95. MODEL STATE CONST. OF THE AMERICAN BAR ASSOCIATION § 8 par. 2 (1962) (judicial article).

96. *Id.* at § 4, par. 1.

bench and bar must be responsible for keeping the system working as well as it can. The best system design possible will not work as envisioned if the people working within it are not dedicated to making it work. In the case of the judicial branch of government, everyone must focus on the purpose of our legal system, which is the administration of justice—equally, fairly, and with dispatch. Even a constitutional change will not provide the means to that end unless there is total dedication on the part of everyone involved to attaining that end.

## VI. CONCLUSION

The delegates to the 1972 Constitutional Convention did not know what they wanted a judicial system to do; therefore, they were unable to design one. The 1972 Constitution perpetuates a series of semi-independent bodies, which “defy attempts to procure coordination and administrative control, result in jurisdictional conflicts, delays in litigation, and duplication of court facilities and personnel and render the administration of justice unbusinesslike and inefficient.”<sup>97</sup> When Montanans realize this, article VII will be amended.