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In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi

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IN SEARCH OF AN INDEPENDENT JUDICIARY: ALTERNATIVES TO JUDICIAL ELECTIONS IN MISSISSIPPI

*David W. Case**

Who's to doom, when the judge himself is dragged to the bar?[1]

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I. INTRODUCTION

A. Overview

The question posed by Melville's Ahab captures the emotionally charged debate at the heart of controversy over judicial selection methods: Who will judge the judges? In Mississippi, state judges are "judged" by the electorate through a system of partisan elections. This article challenges whether popular election of judges is best suited to the goal of selecting the most qualified, independent, and

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1. HERMAN MELVILLE, MOBY DICK, ch. 132 (1851).

responsible judiciary. Along the way, an overview of Mississippi's history with judicial selection will be offered, together with a critical analysis of its current system and a discussion of alternatives.

B. The Tension Between Accountability and Independence

The sometimes virulent exchange of views over judicial selection methods is a continuation of a larger jurisprudential debate with roots in this country as far back as Hamilton and Jefferson.[2] That debate concerns the inevitable tension between principles of democratic accountability and judicial independence. These opposing views have led to the development of "an almost endless combination of schemes used to select judges,"[3] with each state reaching varying conclusions concerning the proper balance between accountability and independence.[4]

The primary argument of those favoring popular election of judges is that the judiciary, as with other public officials, should be accountable to the people.[5] They believe that democratic ideals are best served by a judge's initial mandate being bestowed by the electorate, which may then reaffirm or withhold its approval through periodic elections.[6] The judge thus remains accountable to the voters, insuring an acceptable response "to new and compelling needs of a dynamic society."[7] Most importantly, accountability allows majoritarian control of public

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2. Phillip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. (Special Issue) 31, 37 (1986) [hereinafter Dubois, *Accountability*]. Alexander Hamilton was a vocal defender of the judiciary's need for complete independence "to enforce a constitution which limits the powers of the legislature and the executive, and to protect minorities from any occasional oppression by the government or a majority of the populace." John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 345 n.21 (1988) (citing THE FEDERALIST No. 78, at 398 (Alexander Hamilton) (G. Wills ed., 1982)). On the other side of this historical debate, Thomas Jefferson argued that a judiciary free from public control was at odds with the republican form of government established by the framers of the United States Constitution. *See* John J. Korzen, Comment, *Changing North Carolina's Method of Judicial Selection*, 25 WAKE FOREST L. REV. 253, 253 (1990).

3. Dubois, *Accountability*, *supra* note 2, at 40.

4. *Id.*; *see also* William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Election Have Told Us*, 70 JUDICATURE 340, 352 (1987). It would be difficult to overstate the importance of the connection between judicial selection and tenure and the tension between independence and accountability, and the resulting effect on American jurisprudential history. For example, Robert Cover, in his study of the American judicial role in institutional slavery, discusses the historical relationship between the antebellum judge's concept of his role in reviewing the slavery question and the "tension between independence and accountability of the undemocratic branch of representative government." ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 131 (1975).

> The problem of selection and tenure of judges put the issue directly. Should the judge be accountable to the people directly through popular elections; indirectly through election by state legislatures? Should the role be completely insulated through a tenure of "good behavior," or should there be a term of years? But the selection and tenure issue could not have arisen without recognition of the lawmaking input of the judiciary. There was impetus to subject the judiciary to democratic processes because the creative side of the judge had come to be appreciated more than ever before. That appreciation included the common law function (evolution of doctrine through case-by-case adjudication) and the interpretative function – the creation of doctrine through application of an instrument to particular facts.

Id.

5. *See, e.g.*, Otto B. Mullinax, *Judicial Revision-An Argument Against the Merit Plan for Judicial Selection and Tenure*, 5 TEX. TECH L. REV. 21, 25 (1973).

6. *See id.*

7. *Id.*

policy through electoral control of judicial policymakers.[8] Popular election is also claimed to "benefit" the judiciary by allowing it to function on a "co-equal" footing with the executive and legislative branches.[9]

Critics of judicial elections, however, note that the price of political accountability may be the loss of judicial independence.[10] The judiciary serves a critical anti-majoritarian role requiring protection from popular influence.[11] This principle not only requires freedom from personal or private influence, but immunity from the influence or control of legislatures or executives.[12] Notwithstanding the policymaking function inherent in the judicial role, therefore, the courts should also be independent of temporary public majorities and shifting popular opinion.[13] Judges are neither legislators nor executives, but, instead, occupy a distinctly different role requiring that they apply the law and legal principles in a neutral fashion without regard to political consequences.

Universal agreement is unlikely to ever be achieved in the debate over whether principles of democratic government can be reconciled with the concept of a judiciary insulated from public control. This article is not an attempt to marshal consensus, assuming that to be a reachable goal, as there already exists voluminous legal commentary devoted to attempts to chart a course between these principles. Whether there is any benefit to be realized by a change in Mississippi's method of judicial selection, however, must be considered in the light of these competing viewpoints. Moreover, this article is not purported to be written from a completely indifferent perspective, as it reflects the author's view that increased protection of judicial independence is not only desirable, but necessary. It is hoped that this work will serve as the origination for debate in Mississippi's institutions of government, and that it will contribute to the ongoing discussion of this topic in the state's legal community.

II. MISSISSIPPI JUDICIAL SELECTION: A HISTORICAL PERSPECTIVE

A. Of Constitutional Conventions and Jacksonian Democracy

Following the organization of the Mississippi Territory in 1798, territorial judges were appointed by the president of the United States.[14] In March 1817, Congress passed legislation authorizing the territory's western half to enter the un-

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8. *See* Dubois, *Accountability, supra* note 2, at 36-37.

9. Mullinax, *supra* note 5, at 25.

10. *See* Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 43 (1989).

11. *See* Korzen, *supra* note 2, at 260; Dubois, *Accountability, supra* note 2, at 36.

12. PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 24 (1980) [hereinafter DUBOIS, FROM BALLOT TO BENCH].

13. *Id.*

14. Frank E. Everett, Jr., *Lawyers, Courts, and Judges 1890-1970, in* 2 A HISTORY OF MISSISSIPPI 375, 375-76 (Richard A. McLemore ed., 1973).

ion as its twentieth state.[15] That July, forty-seven delegates convened in the territorial capital of Washington to draft Mississippi's first constitution.[16] The new constitution provided for state judges to hold office "during good behavior," but in no case past the age of sixty-five years.[17] Although the delegates did not expressly define the manner of selection, the new state's judges were eventually elected by the general assembly, rather than the voters.[18]

In October 1817, Governor David Holmes addressed Mississippi's first general assembly.[19] Regarding judicial selection, he instructed the legislature that:

> By the Constitution the Judiciary is placed upon a footing as independent as that of any other State in the union. I therefore feel confident, that you will consider it important, that the appointments should be filled with men learned in the laws, of undoubted integrity, and of an independence of character which cannot be shaken by circumstances unconnected with a faithful and righteous discharge of their duties. In all free governments, the acts of the Judiciary are of more immediate consequence to the safety and tranquillity of society than that of any other department. They pronounce what the law is, not only between contending individuals, but between the public and those who may be charged with public offenses, so that the security of life, liberty and property may be considered as united with the purity and intelligence of those who fill the seats of Justice.[20]

As these comments demonstrate, Mississippi's initial selection system reflected a desire for independence, rather than political accountability.

Andrew Jackson's rise to political prominence in the 1820s signaled the beginnings of a populist reform movement intended to democratize all aspects of government, including the judiciary.[21] The tenets of Jacksonian democracy were perhaps embraced most fervently in Mississippi, where Jackson was revered with "an almost blind political worship."[22] Jackson's Mississippi followers attacked the 1817 constitution as undemocratic, and considered its provisions providing for legislative or executive appointment of most public officials as inconsistent with the concept of public accountability.[23] In 1831, Mississippians overwhelmingly

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15. JOHN R. SKATES, JR., A HISTORY OF THE MISSISSIPPI SUPREME COURT, 1817-1948, 1-2 (1973)[hereinafter SKATES, HISTORY].

16. *Id.* at 2; EDWIN A. MILES, JACKSONIAN DEMOCRACY IN MISSISSIPPI 33 (1960).

17. SKATES, HISTORY, *supra* note 15, at 2.

18. *Id.* at 4; MILES, *supra* note 16, at 33.

19. David Holmes, 1817 Address to the Mississippi General Assembly, *in* INAUGURAL ADDRESSES OF THE GOVERNORS OF MISSISSIPPI 1817-1890 1, 3 (Robert E. McArthur & Dorothy I. Wilson eds., 1981).

20. *Id.* at 3.

21. *See* DUBOIS, FROM BALLOT TO BENCH, *supra* note 12, at 3; Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529, 534 (1991).

22. Porter L. Fortune, Jr., *The Formative Period*, *in* 1 A HISTORY OF MISSISSIPPI 251, 251 (Richard A. McLemore ed., 1973). As an example of Mississippians' unrestrained admiration, when Mississippi's new capital was established at Le Fleur's Bluff on the Pearl River, it was named in honor of Jackson. SKATES, HISTORY, *supra* note 15, at 11.

23. *See* SKATES, HISTORY, *supra* note 15, at 11; Everett, *supra* note 14, at 378-79.

voted to hold a new constitutional convention, and the election of delegates was set for August 1832.[24]

Conflicting and impassioned positions regarding judicial selection quickly became the cornerstone of the delegates' campaigns.[25] A conservative faction, disparagingly referred to as "aristocrats," favored the continued selection of judges by legislative election, although they were willing to substitute appointment by the governor with senate confirmation.[26] The "aristocrats" feared that an elected judiciary would be subject to partisan influences and corruption.[27] The Jacksonians, known as "whole-hogs," insisted that all public officials, including judges, should be elected by the people.[28] A third faction of little influence, labeled "half-hogs," offered a compromise calling for election of lower court judges, but appointment of supreme court judges.[29] In a clear portent of what was to come, the "whole hogs" won a majority of the delegate seats.[30]

At the 1832 convention, although most of the democratic ideals incorporated into the new constitution kindled little opposition, the subject of an elective judiciary was, as expected, highly controversial.[31] Following several clashes in the judiciary committee and on the convention floor, Jacksonian democracy triumphed, and the new constitution provided that all judges, as well as virtually all other public officials, would be chosen by popular election.[32] Mississippi had become the

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24. SKATES, HISTORY, *supra* note 15, at 11-12.

25. Fortune, *supra* note 22, at 280.

26. SKATES, HISTORY, *supra* note 15, at 12.

27. *Id.* The leader of the "aristocrats," Chancellor John A. Quitman, later to become governor of Mississippi, expressed belief that judicial elections "would be dangerous to the extreme, would tend to corruption, and strike a fatal blow at the independence of the judiciary." MILES, *supra* note 16, at 36.

28. SKATES, HISTORY, *supra* note 15, at 12. As one Jacksonian delegate, Steven Duncan, zealously expressed, "You may . . . rest assured that we will give you a constitution . . . much more *democratic* than any other in the U.S. Not *republican*-but downright and absolute *democracy*." JOHN R. SKATES, MISSISSIPPI 86 (1979)[hereinafter SKATES, MISSISSIPPI]; *see also* MILES, *supra* note 16, at 33.

29. SKATES, HISTORY, *supra* note 15, at 12.

30. *Id.*

31. *See* SKATES, HISTORY, *supra* note 15, at 13; Fortune, *supra* note 22, at 282.

32. *See* SKATES, HISTORY, *supra* note 15, at 13; MILES, *supra* note 16, at 42.

first state in the nation to establish a completely elective judiciary,[33] despite predictions of dire consequences by its opponents.[34]

Following the Civil War, Congress, in 1867, declared the ex-Confederate states to be without legal governments, requiring Mississippi to draft a new constitution.[35] The Reconstruction constitution of 1868 eliminated the elective judiciary, and, instead, substituted gubernatorial appointment with the advice and consent of the state senate.[36] By 1890, the demand to replace the Reconstruction constitution had become unyielding, and a new constitutional convention was called.[37] Although the merits of an elective versus appointive judiciary were again vigorously debated, the 1890 constitution made no change in the method of judicial selection.[38]

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33. DUBOIS, FROM BALLOT TO BENCH, *supra* note 12, at 3; Everett, *supra* note 14, at 378. Mississippi had apparently also become the first state to choose popular election as a method of selecting supreme court judges. SKATES, HISTORY, *supra* note 15, at 14. Georgia had, in 1812, provided for election of lower court judges. McClellan, *supra* note 21, at 535 n.43. By virtue of its 1832 constitution, Mississippi became known as the South's most democratic state. SKATES, HISTORY, *supra* note 15, at 13-14. Mississippi's example was not followed until 14 years later when, in 1845, New York established an elective judiciary. DUBOIS, FROM BALLOT TO BENCH, *supra* note 12, at 3.

34. *See* MILES, *supra* note 16, at 42. In fact, ten "aristocrats" voted against final adoption of the constitution because it contained provisions for elected judges. SKATES, HISTORY, *supra* note 15, at 14. One of their members, Judge George Winchester, published an address intended to influence the 1833 legislature to return the state to appointive judgeships, predicting:

> It will not be long before the industrious portion of our community, will become so harassed by the frequent occurrence of elections, that they will leave the election of our judges to the idle and designing. What an admirable character shall we then present.
>
> Citizens of free States will not emigrate with their families and property; or bring their property and persons for purposes of commerce, within the limits of a State where there is no security in the independence of the Judges for the correct and impartial administration of justice. Where the will of a few voters at the polls, dictates the rule of decision to the Judge.

Id. (quoting George Winchester, *An Address to the People of Mississippi* 12 (Mississippi Department of Archives and History, 1933)).

35. SKATES, HISTORY, *supra* note 15, at 32.

36. *Id.* at 33-34. James L. Alcorn, the first governor elected under the 1868 constitution, commented on the change in Mississippi's method of judicial selection in his inaugural address, stating:

> The Constitution of the State has taken the selection of our Judges out of the hands of the people. In this, it intended, evidently, to withdraw the choice of those highly important functionaries from the *passion* of politics. It clearly sought, by the change, to bring to the selection of our Judiciary, all the elevating influences of deliberate judgment, and individual responsibility. And under this view of the objects of the Constitution, I feel it my solemn duty to hold of less binding force than ordinarily, any restraints that may so narrow my choice for the Supreme Bench, as to confine me to men falling below a very high standard of fitness, morally and intellectually.

James L. Alcorn, 1870 Inaugural Address, *in* INAUGURAL ADDRESSES OF THE GOVERNORS OF MISSISSIPPI 1817-1890 103, 109-10 (Robert E. McArthur & Dorothy I. Wilson eds., 1981).

37. SKATES, HISTORY, *supra* note 15, at 41-42.

38. *See id.* at 43.

The issue remained unsettled, however, and was the subject of much discussion during the next three decades.[39] In 1910, the legislature submitted to the voters a proposed constitutional amendment making circuit and chancery court judgeships elective.[40] The amendment was approved and formally inserted into the constitution in 1912.[41] Another proposed amendment requiring the election of supreme court justices was approved by Mississippi voters in November 1914, and became part of the constitution in 1916.[42] Mississippi's principal judicial offices have remained elective positions ever since.

B. Mississippi's Current Framework

Mississippi's highest court is comprised of nine supreme court justices elected for staggered eight year terms.[43] The state is divided into three supreme court districts from which three justices each are elected on an at-large basis.[44] To be qualified for the office, a candidate must be at least thirty-years old and have both practiced law and resided in Mississippi for five years.[45] The supreme court is a

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39. *See* Everett, *supra* note 14, at 379. An interesting view of this debate can be seen from the oratory of Mississippi governors during the period. For example, Governor James K. Vardaman's 1904 inaugural address extolled the virtues of an appointed judiciary.

> The judge . . . should be a man of unquestioned probity, of high moral character, he should be learned in the law, he should be honest and independent . . . . The Governor who appoints him is but [the people's] instrument, performing a sacred trust. I want to impress upon you, my countrymen, that the Governor who would use the appointive power as his personal property, as a mere political asset, for self aggrandizement, falls disappointingly below the ideal, and defeats the lofty purpose of the founders of our government. And the man who would accept the office at the hands of a Governor, who would thus prostitute this sacred function, and then recognize any sort of personal obligation to him in the discharge of his official duty, or the use of the prestige of his high station, is not fit for the place, but on the other hand, degrades the ermine. I want Mississippi to keep up and maintain the grand old standard of excellence, I want the Judiciary exempt from the pernicious influence of political bossism, I want the judge who holds a commission from the Governor to understand that the only obligation or debt he owes that Governor is to perform fairly, fearlessly, intelligently and justly the functions of the office of judge. Let the political judge, that judicial cancer on the body politic, a disease of recent development in Mississippi, let it be extirpated, and as quickly as that sovereign remedy, the honest intelligent ballot, can heal the festering sore, let it become a thing only of odious memory. The cheap, low, sordid, dangerous conception that a judgeship is the private property or political asset of the Governor with which he may purchase and control the services of a few cheap politicians, debauch the bench and the ballot, the very sheet anchor of our political salvation, should be made infamous in the minds of the people.

James K. Vardaman, 1904 Inaugural Address, *in* INAUGURAL ADDRESSES OF THE GOVERNORS OF MISSISSIPPI 1890-1980 20, 24-25 (University of Mississippi Bureau of Governmental Research ed., 1980).

Supporters of judicial elections, however, were given an opportunity for rebuttal only four years later, when Governor Edmond F. Noel argued:

> Election of Judges and Levee Commissioners requires neither more nor different virtue and sense from that involved in choosing district attorneys and other officers. If our carefully culled, high grade electors are unfit to name Judges, their unfitness is equally applicable to other officers and would prove them unworthy of self-government. The people wish to settle this question for themselves and should be trusted with its settlement.

Edmond F. Noel, 1908 Inaugural Address, *in* INAUGURAL ADDRESSES OF THE GOVERNORS OF MISSISSIPPI 1890-1980 34, 35 (University of Mississippi Bureau of Governmental Research ed., 1980).

40. SKATES, HISTORY, *supra* note 15, at 114 n.43; State *ex rel.* Collins v. Jones, 64 So. 241, 241 (Miss. 1914).

41. SKATES, HISTORY, *supra* note 15, at 114 n.43; *Jones*, 64 So. at 241.

42. SKATES, HISTORY, *supra* note 15, at 51.

43. MISS. CONST. art. 6, §§ 145B, 149; MISS. CODE ANN. § 23-15-991 (1990).

44. MISS. CONST. art. 6, §§ 145, 145B.

45. MISS. CONST. art. 6, § 150.

court of general appellate jurisdiction and hears both civil and criminal appeals from Mississippi's twenty circuit court and twenty chancery court districts.[46]

Mississippi's circuit and chancery courts are its primary trial courts.[47] Judges on both courts are elected for four year terms.[48] As with supreme court justices, elections for circuit and chancery judges are held concurrently with the election of representatives to Congress.[49] Circuit judges and chancellors must be at least twenty-six years old, and also have practiced law and resided in Mississippi for five years.[50] Candidates for the supreme court, circuit court, and chancery court

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46. MISS. CODE ANN. § 9-3-9 (1990).

47. Mississippi counties with a population exceeding 50,000 also have county courts, whose judges must possess the same qualifications as do circuit judges. *See* MISS. CODE ANN. §§ 9-9-1(1)(b), 9-9-5 (1991). The Mississippi Constitution further establishes the office of justice court judge (formerly justice of the peace) for each county, with the requirement that such judges be at least a high school graduate or possess a general equivalency diploma and have previously resided for two years within the district to which she is elected. *See* MISS. CONST. art. 6, § 171. Each municipality in Mississippi has a municipal court, except that municipalities with a population of less than 10,000 may opt to allow the mayor to serve as municipal judge. *See* MISS. CODE ANN. §§ 21-23-1, 21-23-5 (1990).

In 1990, the Mississippi legislature created the position of supreme court magistrate. Three magistrates, one from each supreme court district, are appointed by, and serve at the will and pleasure of, the supreme court. MISS. CODE ANN. § 9-3-47(1) (1991). The magistrates must possess the same qualifications as do circuit and chancery judges. *Id.* Loosely defined by statute, their duties are to aid and assist the supreme court in the performance of its duties. *Id.* § 9-3-47(2). The statute authorizing the positions is currently scheduled to expire on December 31, 1995. *Id.*

48. MISS. CONST. art. 6, § 153.

49. MISS. CODE ANN. §§ 23-15-991, 23-15-1013 (1990).

50. MISS. CONST. art. 6, § 154.

are nominated and elected by political party affiliation.[51] Vacancies in these offices, however, are filled, on an interim basis, by gubernatorial appointment.[52]

III. MISSISSIPPI'S JUDICIAL SELECTION METHOD: PARTISAN ELECTION

A. A Critical Analysis

Riding the tide of the Jacksonian reform movement, by the time of the Civil War, twenty-four of the thirty-four states elected judges.[53] The national trend to select judges by popular election continued to the middle of this century.[54] In the last half century, however, partisan election has been abandoned by the majority of

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51. MISS. CODE ANN. § 23-15-997 (1990) provides, in part:

> Nominations of candidates for the office of judge of the Supreme Court by any political party shall be made by districts . . . . The general primary election laws shall apply to and govern the nomination of candidates for the office of judge of the Supreme Court insofar as they may be applicable.

MISS. CODE ANN. § 23-15-1013 (1990) states:

> Nominations of candidates for the office of circuit court judge and for the office of chancery court judge shall be made in every county in their respective districts by primary election . . . . Primary elections . . . shall be held under the general primary election laws of the state.

See also MISS. CODE ANN. §§ 23-15-995, 23-15-1015 (1990) (laws regulating general elections in Mississippi apply to and govern elections for supreme court, and circuit and chancery courts).

County court and justice court judgeships are also elective positions. *See* MISS. CODE ANN. §§ 9-9-5(1), 9-11-2(2) (1991). Municipal court judges, however, are appointed by the governing authorities of the municipality. *See* MISS. CODE ANN. § 21-23-3 (1990).

52. MISS. CODE ANN. § 9-1-103 (1991) states:

> Whenever a vacancy shall occur in any judicial office by reason of death of an incumbent, resignation or retirement of an incumbent, removal of an incumbent from office, or creation of a new judicial office in which there has not heretofore been an incumbent, the Governor shall have the authority to appoint a qualified person to fill such vacancy to serve for the unexpired term or until such vacancy is filled by election as provided in Section 23-15-849, Mississippi Code of 1972. When a vacancy shall occur for any of the reasons enumerated in this section, the clerk of the court shall notify the Governor of such vacancy immediately.

If the unexpired term exceeds nine months, MISS. CODE ANN. § 23-15-849 (1990), requires the governor to make an interim appointment and calls for a special election to be held at the next regular election for state officers or for congressional representatives.

The Mississippi constitution also provides for gubernatorial appointment to fill vacancies in judicial offices, but requires senate concurrence for such appointments.

> The governor shall have power to fill any vacancy which may happen during the recess of the senate in the office of judge or chancellor, by making a temporary appointment of an incumbent, which shall expire at the end of the next session of the senate, unless a successor shall be sooner appointed and confirmed by the senate. When a temporary appointment of a judge or chancellor has been made during recess of the senate, the governor shall have no power to remove the person or appointee, nor power to withhold his name from the senate for their action.

MISS. CONST. art. 6, § 177.

Following the 1912 amendment of article 6, section 153 of the constitution (mandating the election, rather than appointment, of circuit judges and chancellors), however, the governor's power to make appointments pursuant to Section 177 was challenged in State *ex rel.* Collins v. Jones, 64 So. 241 (Miss. 1914). The court held that the amendment of Section 153 removing the governor's power to appoint circuit judges and chancellors also deprived him of the ability to make appointments under Section 177. *Id.* at 256-57. Because of *Jones*, the governor's authority to make interim judicial appointments appears to come strictly from MISS. CODE ANN. § 9-1-103 (1991). Accordingly, it appears that Section 177's requirement of senatorial approval for such appointments is also inert.

53. ALLAN ASHMAN & JAMES J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 9 (1974).

54. *See* Hill, *supra* note 2, at 346; Korzen, *supra* note 3, at 258.

states as the primary means of judicial selection.[55] Although Mississippi is not alone in selecting all of its appellate and general jurisdiction trial court judges through partisan election, the list of states that continue to do so is slight.[56] Only Alabama, Arkansas, Illinois, North Carolina, Pennsylvania, Texas and West Virginia join Mississippi in making commensurable wholesale use of the partisan ballot.[57]

A weakness of partisan election as a judicial selection method is the perception that it opens the judiciary to the unfavorable influence and control of party politics.[58] Support in judicial election campaigns, for example, may be used as a reward to individuals who have engaged in high levels of party activity.[59] Re-election campaigns may require continued fidelity to party politics even after a candidate takes judicial office.[60] In states where political parties play an active role in choosing judicial candidates, the voters merely decide between the selections of party officials.[61] In such a case, political parties, and not the electorate, play the critical role in judicial selection.[62] Moreover, elective judgeships tend to favor politically skillful candidates, or those whose names are well-known from past political campaigns.[63] There is, of course, no guarantee that the qualities of a successful politician are concomitant with those that make a good judge.[64]

The expensive and contentious political climate which permeates partisan elections may also deter highly qualified and desirable candidates from seeking judicial office.[65] An elected judge's equivocal job security, inadequate compensation, the continual campaigning and participation in competitive politics, and a system that rewards the politically skillful, rather than those with superior judicial credentials, are among the factors that discourage many well-qualified lawyers from pursuing an elective judgeship.[66] This is said to create "an implicit self-selection

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55. *See* Hill, *supra* note 2, at 340.

56. *See* THE BOOK OF THE STATES 1990-91, 210-11 (The Council of State Government ed., 1990).

57. *Id.*; SARA MATHIAS, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS 142 (1990). Although to a lesser extent, other states also make significant use of partisan elections to select a portion of their judiciary. For example, Tennessee elects its supreme court and most of its trial court judges through partisan balloting. *See* THE BOOK OF THE STATES, *supra* note 56, at 211. New York also selects much of its judiciary through partisan election. *See id.*

58. *See* Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 510 (1978).

59. *Id.*

60. *See* Hill, *supra* note 2, at 360.

61. *See* John D. Felice & John C. Kilwein, *Strike One, Strike two . . .: The History of and Prospect for Judicial Reform in Ohio*, 75 JUDICATURE 193, 196 (1992).

62. *Id.*

63. *See* Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 1997-98 (1988). The 1988 election to the Mississippi Supreme Court of Edwin Pittman, former state Attorney General, Secretary of State, and gubernatorial candidate, is one example of previous political experience and name recognition providing a significant benefit in a judicial election.

64. *See* Hill, *supra* note 2, at 349 (quoting A. H. McNight, *How Shall Our Judges Be Selected*, 5 TEX. L. REV. 470, 472-73 (1928)).

65. *See* DUBOIS, FROM BALLOT TO BENCH, *supra* note 12, at 6; Felice & Kilwein, *supra* note 61, at 195.

66. DUBOIS, FROM BALLOT TO BENCH, *supra* note 12, at 6.

effect" that eliminates many of the most qualified before the selection process even begins.[67]

A concern at the opposite end of the spectrum, however, is that there are few checks inherent in the electoral process preventing the occasional election of individuals of uncertain judicial ability.[68] Although notable exceptions exist, the electorate pays little attention to judicial elections, for which empirical verification exists that voter turnout is notoriously low.[69] Given the low visibility of judicial elections, and often apathetic voter attitudes, such a selection process runs a grave risk of individuals reaching the bench with virtually no consideration having been given to whether they are qualified for the position.

The perception that voters are disinterested and uninformed contributes to "the most fundamental and damning of the criticisms leveled against popular judicial elections"—that they are an ineffective tool for achieving the intended purpose of holding judges accountable to the public.[70] "Popular control over the judiciary and the maintenance of the principle of judicial accountability are impossible . . . if voters know not for whom or what they are voting."[71] This particular censure of partisan elections has, however, been forcefully challenged.[72] Nevertheless, and although quite unrelated to the issue of whether judges *ought* to be politically accountable,[73] the fact that voters tend not to exercise their franchise in judicial races strongly suggests that the concept of *public* accountability over judges, as a whole, may be illusory.

The adverse effect of rigorous campaigning on the administration of the court system is another disadvantage inherent in an elective judiciary.[74] The time spent by incumbent judges on campaigning can dramatically decrease productivity and substantially burden otherwise overloaded court systems.[75] This factor is especially important in Mississippi where judicial resources are sometimes in scarce supply. Mississippi's judiciary presently operates under a significant backlog with court filings at all levels currently at an all time high.[76] Indeed, in an effort to alleviate the current strain, the state bar is promoting the creation of an intermediate appellate court system and provisions for additional administrative support.[77] Considering the already burdensome administrative concerns faced by Missis-

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67. Felice & Kilwein, *supra* note 61, at 195.

68. *See* DUBOIS, FROM BALLOT TO BENCH, *supra* note 12, at 7.

69. Mary L. Volcansek, *The Effects of Judicial Selection Reform: What We Know and What We Do Not, in* THE ANALYSIS OF JUDICIAL REFORM 79, 80 (Philip L. Dubois ed., 1982). *See also* Dubois, *Accountability, supra* note 2, at 43; Glick, *supra* note 58, at 517.

70. DUBOIS, FROM BALLOT TO BENCH, *supra* note 12, at 28.

71. *Id.* at 33.

72. *See, e.g.*, Dubois, *Accountability, supra* note 2, at 49-51.

73. *See id.* at 49.

74. *See* Robert F. Utter, *Selection and Retention – A Judge's Perspective*, 48 WASH. L. REV. 839, 845 (1973).

75. *Id.*

76. *See* S. Allan Alexander, *What Does the Future Hold for the Judicial System in Mississippi*, MISS. LAW., April/May 1992, at 13, 13-14.

77. *Id.* at 14.

sippi judges, removing the distracting and time consuming chore of electioneering can only enhance judicial productivity and efficiency.[78]

The tremendous cost of political campaigns exposes many of the more compelling liabilities of partisan election as a judicial selection mechanism. Chief among them is that lawyers and litigants likely to appear before the judge comprise the primary source of campaign funds.[79] Not surprisingly, therefore, avoiding the appearance of impropriety while still raising the funds necessary to conduct a successful campaign is a virtual impossibility.[80] A selection system that requires funding from the very individuals over whom judges must remain impartial arbiters is, unfortunately, open to charges that financial influence affects judicial decision-making.[81] The appearance of impropriety is only heightened when spiraling campaign costs require judges, in an effort to retire campaign debt, to continue soliciting funds from lawyers and litigants even after winning election.[82] A request for such assistance from a newly elected judge is, obviously, difficult to refuse.[83] As Washington Supreme Court Justice Robert Utter has commented, "[t]he mere appearance of a judge's ability to reward his supporters . . . and discriminate against those who did not support him creates a situation which can only reduce public confidence in the judiciary."[84]

Mississippi has joined other states in enacting a judicial ethics code which attempts to screen candidates from their campaign contributors by prohibiting direct solicitation, and, instead, requiring the establishment of fund-raising committees.[85] The use of such intermediaries, however, is criticized as an ineffective means of keeping knowledge of contributors from candidates, especially in states where such information is public record.[86] Indeed, many contributors are unwill-

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78. *See generally* Eugene M. Bogen, *Increasing the Productivity & Efficiency of Trial Judges*, MISS. LAW., April/May 1992, at 29.

79. *See* Norman Krivosha, *Acquiring Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 SW. L.J. (Special Issue) 15, 20 (1986)[hereinafter Krivosha, *Merit Selection*]; Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of The Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184, 184 (1991).

80. *See* Krivosha, *Merit Selection*, *supra* note 79, at 19-20; Korzen, *supra* note 2, at 262.

81. *See* Hill, *supra* note 2, at 341-42 (describing adverse national publicity concerning the propriety of campaign contributions to Texas judges).

82. *See* MATHIAS, *supra* note 57, at 57.

83. *Id.*

84. Utter, *supra* note 74, at 843.

85. *See* MATHIAS, *supra* note 57, at 56. The Mississippi Code of Judicial Conduct provides:

> A candidate, including an incumbent judge, for judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than (90) days before a primary election and not later than (90) days after last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

MISS. CODE OF JUDICIAL CONDUCT Canon 7B(2) (1974).

86. MATHIAS, *supra* note 57, at 56. *See* MISS. CODE ANN. §§ 23-15-805, 23-15-807 (1990) (requiring candidate to disclose information related to campaign contributors).

ing to give *unless* they are convinced that the candidate *will* know. Moreover, even where committees are responsible for soliciting contributions, judges attend campaign fund-raisers and cannot help but take notice of who is, and is not, present.[87] Also questionable is whether this approach effectively solves the problem of extraneous contact with lawyers who regularly practice before the judge, since the committees are generally comprised of such lawyers who continue to solicit funds from the same pool.[88]

Beyond even the perceived inappropriateness of campaign fund-raising, requests for support in judicial elections result in severe pressures on the legal community.[89] Lawyers may feel compelled to support an incumbent judge, concluding that support for an unsuccessful challenger might not be well-received following the election.[90] Indeed, studies reflect that lawyers are more likely to support the incumbent, even though they believe the opposing candidate to be *more* qualified.[91] Lawyers may feel obligated to give to a particular judicial campaign in order to protect their clients' interests, or may face the loss of legal work from clients who believe that public support of the loser in a judicial contest could adversely affect judicial decision-making.[92] Further, multiple judicial races represent a financial strain to lawyers receiving numerous requests for support who are unwilling to resist the instinct to cover all bases.[93] Of course, financial pressures are not limited to those from whom funds are solicited. The burden of financing outrageously expensive political campaigns may also force incumbent judges to take on substantial personal debt in order to retain office.[94]

Legal commentators have also noted that partisan campaigning for judicial office has become increasingly strident, outspoken, and controversial, thus destroying the cautious, reserved, and rational image that the judiciary should project.[95] Because the public pays closer attention to criminal justice issues than sometimes less interesting civil matters, judicial campaigns increasingly evoke horrific images of murder weapons, electric chairs and slamming cell doors. Such imagery obviously gains the attention of voters, but more often than not is only empty rhetoric. All too often, judicial elections lack substance due to the restrictions of judicial ethics codes, as in Mississippi, prohibiting candidates from making pledges or promises of future performance in office or from stating views on disputed legal or

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87. Krivosha, *Merit Selection*, *supra* note 79, at 20.

88. *See* MATHIAS, *supra* note 57, at 57.

89. Utter, *supra* note 74, at 843.

90. *Id.*

91. Orrin W. Johnson & Laura J. Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH L. REV. 525, 550 & nn. 141 & 143 (1992).

92. *Id.* at 550; Utter, *supra* note 74, at 843.

93. Utter, *supra* note 74, at 843.

94. *See id.* at 845 (noting that some incumbent judges have been compelled to sell their homes to pay campaign costs); Mark Hansen, *The High Cost of Judging*, A.B.A. J., Sept. 1991, at 44.

95. *See, e.g.*, Glick, *supra* note 58, at 514; MATHIAS, *supra* note 57, at 31-32; PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 69-70 (1990).

political issues.[96] The advantage in accountability gained by electing public officials is lost in an atmosphere precluding meaningful debate and preventing candidates from making their views known to the electorate.[97] Substantive topics are sometimes addressed, however, and an opponent, or interested partisan groups, will occasionally attack an incumbent judge's record on disputed issues.[98] In such an instance, the judge is faced with the choice of leaving perhaps debatable charges unanswered or responding in risk of violating the ethics code.[99] Placing a sitting judge in the untenable situation of having to commit an ethical violation in order to win an election can only serve to undermine public trust in the judiciary.[100]

Certainly not the least of the negative imputations against forcing judges to become partisan politicians is the potentially dangerous consequence to the unique role and obligation of the judicial branch in our system of government. Treating judges as if they are legislators or executives ignores the fundamental differences in the respective functions of each. As was admirably stated by Norman Krivosha, former chief justice of Nebraska:

> It makes perfectly good sense in a free, democratic society to suggest that the people's representatives occupying the legislative branch of government should be selected by the people whom they are to represent. Likewise, it makes perfectly good sense to suggest that the head of the executive branch of government should be selected by the people whom he or she represents. It makes no sense at all to talk

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96. *See* Dubois, *Accountability, supra* note 2, at 37. This prohibition is included in the Mississippi Code of Judicial Conduct, which states:

> A candidate, including an incumbent judge, for a judicial office that is filled . . . by public election between competing candidates . . . :
>
> should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

MISS. CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1974).

97. As noted by one Illinois supreme court justice:

> What are two judicial candidates who run against each other supposed to say to the voters? Is one candidate going to promise more justice than his opponent? Are they going to pledge to find more people guilty or more people innocent, or sentence more people to death? Are they going to pledge to be for or against statutes permitting or prohibiting abortions, without waiting to hear any arguments? Even if candidates wanted to, the canons of judicial ethics forbid such outrageous conduct. Invariably candidates for judicial office are reduced to bland statements that seldom get mentioned in the newspapers. That is why judicial contests leave even the most conscientious citizens apathetic and disinterested.

Hill, *supra* note 2, at 358 (quoting S. Simon, *After "Greylord" What?*, Address to the Chicago Bar Association and Illinois State Bar Association, Dinner Honoring Illinois Supreme Court (Nov. 4, 1983) (available at University of Chicago Law Review)).

The restrictions on meaningful debate can sometimes lead to absurd campaign rhetoric. For example, in a 1992 primary campaign for a Mississippi Supreme Court post, one candidate, in an obvious play on recessionary fears, indicated that a vote for him would improve the state's job climate. Another candidate implied that, if elected, he would eliminate plea bargaining in the supreme court. These issues, quite obviously, have no relevance to election to an appellate court. They are, however, an outgrowth of the prohibitions against substantive debate in judicial elections. Clearly, judicial ethics codes represent a restraint on free speech and fair comment by judicial candidates. Recognizing that "[v]oters need and judges are entitled to judicial freedom of speech," Oregon has abandoned Canon 7 of the ABA's judicial ethics code for a rule that restricts only those comments that would "disqualify a judge in an actual case or undermine confidence in the political nonpartisanship of the judiciary." Linde, *supra* note 63, at 2001.

98. Korzen, *supra* note 2, at 261.

99. *Id.*

100. *See* Linde, *supra* note 63, at 2001.

about representation when examining the judicial branch of government. Legislators have constituents and, therefore, should be popularly elected. Governors have constituents and, therefore, should also be popularly elected. Judges are prohibited by law from having constituents; therefore, subjecting them to popular election is totally without reason.[101]

Individuals desirous of making their views known have a perfect right to approach and lobby their legislators or executives.[102] Similar contacts with a judge, however, are improper. When the people disagree with the law, their efforts are appropriately directed toward their elected representatives. Unpopular court holdings can be changed by enactment of new laws. Constitutions can be amended. Judges, however, must remain impartial decision-makers, not advocates. As expressed by former Texas Supreme Court Justice John Hill:

> The point cannot be over-emphasized: a judge is not an advocate. A judge's role is not to "push" an agenda or champion any particular point of view. Rather, advocacy in courts is peculiarly the role of the lawyer. Our adversary system contemplates that both sides to a dispute, including a criminal prosecution, have the opportunity to be represented by a trained advocate. The public good does not require that judges be advocates for particular causes, but rather that they be fair and impartial persons. When all of this is considered, partisan politics proves to be a particularly undesirable mechanism for judicial selection.[103]

The pressures of partisan politics threaten to undermine the impartial, anti-majoritarian role of judges. Allowing the fates of judges to be utterly dependent on the passing whims of public perception cannot help but adversely affect judicial decision-making. As discussed in the following section, instead of applying the law in an impartial and neutral fashion, the reality of a looming election may well cause a judge's first concern not to be an issue's legal correctness, but what its political impact will be on the electorate.[104] If such continues to be the case, the ideal of an independent judiciary in Mississippi will become a long-forgotten memory.

B. A Recent Example

Mississippi has recently experienced an unfortunate exhibition of how vulnerable judicial independence is when combined with partisan politics. In the words of one Mississippi newspaper, the March 1992 Democratic primary between incumbent Mississippi Supreme Court Justice James L. Robertson and former Chancery

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101. Krivosha, *Merit Selection*, *supra* note 79, at 16 (footnote omitted). *See also* Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128, 131 (1990) [hereinafter Krivosha, *In Celebration*].

102. *See* Krivosha, *Merit Selection*, *supra* note 79, at 16-17.

103. Hill, *supra* note 2, at 361 (footnote omitted).

104. Former California Supreme Court Justice Otto Kaus has noted:

> "There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub."

Utter, *supra* note 10, at 19 (quoting from Paul Reidinger, *The Politics of Judging*, A.B.A. J., April 1, 1987, at 52, 58).

Judge James L. Roberts, Jr., "demonstrates the folly of electing judges, the public office that most needs to be removed from politics."[105] That an incumbent justice suffered defeat is certainly a noteworthy event, but of greater consequence is the manner in which the campaign was marred by volatile attacks by victim's rights advocates and Mississippi prosecutors who joined in a concerted effort to oppose Justice Robertson's re-election.[106] The focal point of the assault was his record on capital punishment, which was depicted as "virtually ha[ving] done away with the death penalty."[107]

The Mississippi Prosecutor's Association's public endorsement of Judge Roberts' candidacy, through a one-page resolution based on a vote of its board of directors, was perhaps the most dramatic event of the campaign.[108] The resolution maintained that Roberts "best represents the views of the law abiding citizens in regards to the administration of criminal justice in this state."[109] It offered the further view, impressively long on rhetoric but short on factual support, that decisions of the Mississippi Supreme Court had created "judicial turmoil and chaos", "tied the hands of prosecutors and law officers", "denied justice", and had "given criminal defendants rights not required by the constitution."[110]

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105. *Re-elect Robertson; Stop Electing Judges,* NORTHEAST MISS. DAILY J. (Tupelo, Miss.), March 6, 1992, at 2 [hereinafter *Re-elect Robertson*]. The fact that this article examines *only* the 1992 Robertson/Roberts election campaign (and then only in relatively brief fashion) is not intended to suggest that there have not been other campaigns of equal, or greater, empirical value in demonstrating significant uncertainties of partisan election as a judicial selection device. The defeat of former Mississippi Supreme Court Justice Joel Blass in 1990, and the 1992 Republican supreme court primary in the Central District, are also excellent examples deserving of close examination. The undermining of judicial independence inherent in the comprehensive distortion and manipulation of Justice Robertson's record through the partisan electoral process, however, is the reason that this particular election is chosen for discussion.

106. *See* Carole Lawes & Beverly P. Kraft, *High Court Judge Coddled Criminals, Critics Say,* THE CLARION-LEDGER (Jackson, Miss.), March 13, 1992, at B1.

107. *Id.* Needless to say, the prospect that one out of nine justices on a state supreme court could individually have "virtually" done away with capital punishment is remote at best.

108. *Id.* The full text of the resolution follows:

> BE IT RESOLVED that the Mississippi Prosecutor's Association, by a vote taken by the Board of Directors in Jackson, Mississippi on January 23, 1992, endorses the candidacy of former Public Safety Commissioner, Judge James L. Roberts, Jr. for the office of Justice of the Supreme Court of Mississippi from the Northern District, Post I, District III. The membership of the Mississippi Prosecutor's Association feels that Judge James L. Roberts, Jr. best represents the views of the law abiding citizens in regards to the administration of criminal justice in this state. The judicial turmoil and chaos created by procedural decisions of the Mississippi Supreme Court have tied the hands of prosecutors and law officers in the enforcement of the criminal laws of this State. Recent Mississippi Supreme Court rulings have caused unnecessary delays, denied justice, unreasonably increased costs to taxpayers and given criminal defendants rights not required by the constitution. We feel that as a Justice on the Mississippi Supreme Court, Judge James L. Roberts, Jr. will give the crime victims and the good, honest and law abiding people of this state a hearing at least as fair as that of the criminal in child abuse, death penalty and other serious criminal cases. Having been County Attorney of Pontotoc County for twelve years, a former active member of the Mississippi Prosecutors Association, Commissioner of Public Safety for the State of Mississippi for four years, and since 1988, as a Chancery Judge of the First Judicial District, Judge James L. Roberts, Jr. knows the practical problems faced by prosecutors and law enforcement in the day-to-day administration of criminal justice in the courtroom. We urge the citizens of the Northern District of Mississippi to vote for and elect Judge James L. Roberts, Jr. as Justice of the Mississippi Supreme Court.

Resolution of the Mississippi Prosecutor's Association (Jan. 23, 1992) (on file with author) [hereinafter Resolution].

109. Resolution, *supra* note 108.

110. *Id.*

The improvident decision of government lawyers to publicly oppose a sitting judge before whom the State of Mississippi regularly appeals shows, at the very least, a remarkable disregard for judicial independence, and apparent disrespect for the respective roles of prosecutor and judge. The action may be explained by the fact that Mississippi's district attorneys are also elected officials and must periodically face the voters in order to retain their jobs.[111] Court decisions involving crime and punishment, daily fare on television and in newspapers, may, in the eyes of voters, reflect on a prosecutor's job performance, especially where unpopular reversals of criminal convictions may be the result of errors by lawyers or law enforcement officials. Prosecutors, themselves confronted with competitive elections, may thus find that it makes political sense to attack an incumbent judge in defense of his or her own job tenure.[112] Political expediency, however, hardly justifies interference with the impartiality and integrity of the judiciary, especially by officers of the court whose obligation to protect the rights of criminal defendants should be as equally unflagging as that of judges. Even leaving aside the issue of propriety,[113] this action dramatically confirms the dangers of involving judges in partisan politics. The judiciary's independence depends on insulation from retributive attacks by governmental entities and officials whose actions it must regularly review.

Equally reproachful, however, was the relentless and comprehensive campaign of distortion waged against Justice Robertson's record, primarily focused on various criminal appeals decided during his tenure. Much of the misinformation was presented to the electorate by way of a lengthy and, not surprisingly, anonymous

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111. *See* MISS. CODE ANN. § 23-15-193 (1990).

112. As a *Northeast Mississippi Daily Journal* editorial cogently noted prior to the election:

> It is a dangerous peculiarity in Mississippi that men and women expected to impartially interpret the law sometimes become embroiled in campaigns based on emotions and feelings having nothing to do with what the law clearly requires.
>
> Placing judges in the political arena makes them unfair targets for people or groups who seek to blame one person for a judgment that may have been handed down by a 9-0 majority of the Supreme Court. *The judgments of courts sometimes point out the errors of lawyers who then seek to cover their flaws by appealing to the anger and frustration of people who feel wronged* . . . . Judges sometimes must rule on seemingly small points of law because the Constitution of the United States requires due process and equal protection for all citizens – even those who are an abomination in the eyes of society. A legal technicality to one person is another person's basic constitutional right.

Re-elect Robertson, supra note 105, at 2 (emphasis added). In this regard, politically motivated attacks during an election campaign, no matter the source, may actually be assisted by the restrictions of the judicial ethics code, which would make it highly unlikely that an adequate response, if any, could be made by a judicial candidate. *See supra* notes 96-100 and accompanying text.

113. *See* Linde, *supra* note 63, at 2003 (noting that Oregon's elected attorney general "regards it as improper for government lawyers identifying themselves as such to support or oppose the judges before whom the state appeals"); *see also* Dick Thornburgh, *Prosecutors and the Press in the Search for the Truth, the Whole Truth and Nothing But the Truth*, 75 JUDICATURE 20, 21 (1991) (reflecting that the prosecutor's obligation to protect the rights of the defendant and the integrity of the judicial process requires that he or she not act from political motives).

circular distributed during the campaign.[114] For example, based on his dissenting opinion in *Clemons v. State*,[115] Robertson was described as believing a defendant who "shot an unarmed pizza delivery boy in cold-blood" had not committed a crime serious enough to warrant the death penalty.[116] The truth, however, is that Justice Robertson concurred in the affirmance of Clemons' capital murder conviction.[117] The dissent was, instead, concerned with the lower court's instruction to the jury, during sentencing, that an aggravating circumstance existed if the crime was "especially heinous, atrocious or cruel."[118] Justice Robertson argued that the United States Supreme Court had, in *Maynard v. Cartwright*,[119] reviewed identical language in an Oklahoma statute and found it unconstitutionally vague.[120] The dissent maintained, therefore, that the case should be remanded for resentencing.[121] The Supreme Court subsequently reversed the sentence in *Clemons v. Mississippi*,[122] although under a different rationale than suggested by Justice Robertson.[123]

Another Robertson dissent, in *Minnick v. State*,[124] received similar treatment.[125] In *Minnick*, the defendant, who in a previous interrogation had requested and been provided with counsel, was compelled by law enforcement officers to attend another interview without his lawyer.[126] The Mississippi Supreme Court, with Justice Robertson alone in dissent, concluded that the subsequent confession was not taken in violation of Minnick's Fifth and Sixth Amendment rights to counsel.[127] The United States Supreme Court subsequently reversed, holding that the officers were prohibited from reinstating interrogation without the presence of

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114. *See* David G. Sansing, *Campaign Ads Against Robertson are Misleading* (Letters to the Editor), THE GREENWOOD COMMONWEALTH, February 28, 1992, at 4. It cannot be emphasized strongly enough, however, that the materials in question are attributable to partisans that were neither involved in, nor subject to the control of, Judge Robert's campaign organization. Interview with William Liston, Chairman of the Committee to Re-Elect Justice James Lawton Robertson, in Winona, Miss. (May 9, 1992).

115. 535 So. 2d 1354 (Miss. 1988), *rev'd*, 110 S. Ct. 1441 (1990).

116. Memorandum of the Robertson Re-Election Committee in Response to Charges Concerning Justice Robertson's Record 5 (on file with author).

117. 535 So. 2d at 1367 (Robertson, J., dissenting).

118. *Id.*

119. 486 U.S. 356 (1988).

120. *Clemons*, 535 So. 2d at 1367-68 (Robertson, J., dissenting).

121. *Id.* at 1371.

122. 110 S. Ct. 1441 (1990).

123. Justice Robertson's *Clemons* dissent noted that the "unmistakable effect of the majority's opinion" was that it had performed the jury's function of balancing aggravating and mitigating circumstances. 535 So. 2d at 1371. The Supreme Court held, however, that it is constitutionally permissible for a state appellate court to uphold a death sentence based in part on an improperly defined aggravating circumstance by either reweighing aggravating and mitigating circumstances or under harmless error review. *Clemons*, 110 S. Ct. at 1444. Nevertheless, on remand, the Mississippi Supreme Court held that it lacked authority under state law to engage in a reweighing analysis and that the error in instructing the jury was not harmless beyond a reasonable doubt. Clemons v. State, 593 So. 2d 1004, 1007 (Miss. 1992). The case was, therefore, remanded to the circuit court for resentencing. *Id.*

124. 551 So. 2d 77 (Miss. 1988), *rev'd*, 111 S. Ct. 486 (1990).

125. *See* Sansing, *supra* note 114, at 4.

126. Minnick v. Mississippi, 111 S. Ct. 486, 488-89 (1990).

127. *Id.* at 489; *Minnick*, 551 So. 2d at 101 (Robertson, J., dissenting).

Minnick's counsel.[128] Materials distributed to the voters, however, stated only that Justice Robertson had dissented, without disclosing the Court's subsequent reversal of the majority opinion on the precise grounds which had been urged by Justice Robertson.[129]

Justice Robertson was also criticized for his vote to reverse the capital conviction in *Bevill v. State*,[130] a highly publicized case involving the kidnapping, rape and murder of an eighteen-year old woman.[131] Again, however, the distributed information discussed only Justice Robertson's vote;[132] it did not mention that the vote had been unanimous to reverse and remand for a new trial because an admission by Bevill elicited by law enforcement officers without a Miranda warning was erroneously introduced into evidence.[133]

The foregoing discussion represents a very small, but representative, sampling of the deceptive message given to the voters regarding Justice Robertson's work on the court. That such misinformation is so easily disseminated is simply another demonstration of the unreliability of partisan election as a method of judicial selection. A similar election year attack could just as easily have been waged against any of the justices currently on Mississippi's supreme court. Appellate courts, unlike trial courts, involve collegial decision making. In other words, before an appellate judge can affect the result of an appeal, another judge (or judges) must agree, or a majority of a higher court if the judge's views are in dissent. This concept is often difficult for voters to accept and, therefore, unpopular appellate decisions may, regardless of authorship, result in the vilification of any judge unfortunate enough to be running for re-election during the latest public controversy.[134] As was the case for Justice Robertson, "opponents will attack the court's result without regard to its reasons."[135]

There can be little defense for a judicial selection system where judges are politically vulnerable simply because their decisions are legally correct.[136] Objectivity and impartiality become the exception to the rule in a system that so promotes self-protective judicial decision-making.[137] There have been numerous calls in Mississippi to abandon the selection of judges in such a blatantly political manner.[138] If these warnings are not heeded, the level of competence and integrity expected of

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128. *Minnick*, 111 S. Ct. at 491.

129. *See* Sansing, *supra* note 114, at 4.

130. 556 So. 2d 699 (Miss. 1990).

131. *See* Sansing, *supra* note 114, at 4; Lawes & Kraft, *supra* note 106, at B1.

132. *See* Sansing, *supra* note 114, at 4.

133. *Bevill*, 556 So. 2d at 700.

134. *See* Linde, *supra* note 63, at 2001.

135. *Id.* at 2000.

136. *Id.* at 2001.

137. Nicholas P. Lovrich et al., *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28, 28 (1989).

138. *See, e.g.*, *Re-elect Robertson*, *supra* note 105, at 2; *Supreme Court: State District Dispute Settled Now?*, THE CLARION LEDGER (Jackson, Miss.), July 19, 1992, at 4G; Alex A. Alston, Jr., *President's Column: Sanctity of the Courts*, MISS. LAW., April/May 1992, at 7.

Mississippi's judiciary may end up a sacrifice on the altar of political accountability.

IV. ALTERNATIVE SELECTION METHODS

For a state inclined to abandon partisan election as its method of judicial selection,[139] there exist three major alternatives: (1) non-partisan election; (2) appointment; and (3) commission selection.[140] This seeming simplicity, however, is belied by the number of contrasting approaches to selecting judges developed among the states.[141] Many states have devised "hybrid systems" in which different levels of the judiciary are selected by completely different systems.[142] States may also fill vacancies in judicial offices in a manner unlike that used for initial selection.[143] This section will offer a brief discussion of the major alternatives to partisan election with particular emphasis on commission selection, considered the most popular of the selection systems.[144]

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139. The Voting Rights Act of 1965, Section 2, as amended, 42 U.S.C. § 1973 (1988), prohibits states from implementing voting procedures that act as a denial of the right to vote because of race or color. States, including Mississippi, with a history of "substantial voting discrimination" are required by section 5 of the Act, 42 U.S.C. § 1973c, to submit changes in their voting procedures to the United States Attorney General or to the United States District Court for the District of Columbia for preclearance. *See* South Carolina v. Katzenbach, 383 U.S. 301, 329 (1966). The United States Supreme Court has held that section 2 and section 5 of the Act apply to judicial elections. Chisom v. Roemer, 111 S. Ct. 2354, 2366 (1991).

The Court recently signaled, however, that a state's decision to convert its judicial selection system from popular election to a non-elective process would not run afoul of the Voting Rights Act. In *Chisom*, the Court noted:

> The [Fifth Circuit, in *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620, 622 (5th Cir. 1990), *rev'd*, 111 S. Ct. 2376 (1991)] was, of course, entirely correct in observing that "judges need not be elected at all," and that ideally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment. The Framers of the Constitution had a similar understanding of the judicial role, and as a consequence, they established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection. Indeed, these views were generally shared by the States during the early years of the Republic. Louisiana, however, has chosen a different course. It has decided to elect its judges and to compel judicial candidates to vie for popular support just as other political candidates do.
>
> The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office . . . . *Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed, and in that way, it could enable its judges to be indifferent to popular opinion.* The reasons why Louisiana has chosen otherwise are precisely the reasons why it is appropriate for § 2, as well as § 5, of the Voting Rights Act to continue to apply to its judicial elections.

Chisom, 111 S. Ct. at 2366-67 (emphasis added) (citation and footnotes omitted). For further discussion of this issue, see Johnson & Urbis, *supra* note 91, at 525-28 & nn.8-9. *See generally* Suzanne G. Marsh, Comment, *Judges as Representatives Under the Voting Rights Act*, 22 CUMB. L. REV. 331 (1992).

140. Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. (Special Issue) 53, 57 (1986).

141. *Id.*

142. *Id. See also* THE BOOK OF THE STATES, *supra* note 56, at 210-12 (describing in detail the various modes of judicial selection utilized by the states and United States territories).

143. Champagne, *supra* note 140, at 57. As discussed, Mississippi is such a state. *See supra* notes 51-52 and accompanying text.

144. *See* Glick, *supra* note 58, at 509-10.

A. Non-partisan Election

The first alternative to partisan judicial elections was developed by midwestern and western states entering the union in the late nineteenth and early twentieth centuries.[145] Progressive reformers hoped that non-partisan elections would allow voters to focus on candidates' individual traits without regard to political considerations.[146] The goal of non-partisan elections is to remove judicial elections from party politics, freeing candidates from partisan obligations and allowing voters to decide on the basis of merit, rather than party affiliation.[147] Non-partisan ballots are intended to avoid straight party voting, thus preventing judicial candidates from becoming enmeshed in the "sweep factor", where, because of volatile political events, legislative and executive officials of one party are swept out of office in favor of candidates from the other.[148] In a further effort to limit the influence of party politics, some states schedule judicial elections in off-years.[149]

Despite the laudable objective of removing judges from party politics, critics argue that non-partisan elections "are in many respects worse than partisan judicial elections."[150] Foremost among the criticisms is that non-partisan elections have even lower visibility and voter participation than do partisan elections.[151] In fact, studies have shown that voter participation decreases in proportion to increases in effort to remove judicial elections from partisan politics.[152] Because of the paucity of information typically available in judicial elections, voters tend to rely heavily on party cues as a determining factor.[153] Without the party label, confusion tends to discourage voters from even casting ballots in non-partisan elections.[154] To the extent that accountability can be measured in terms of voter participation, therefore, non-partisan elections have even less to offer in that regard than do partisan elections. Nor are concerns for judicial independence satisfied, as non-partisan elections do little to shield judges from the transitory whims of majoritarian electoral politics. Moreover, all of the more tangible disadvantages to electing judges, such as fund-rasing, high cost, and time spent away from judicial duties because of campaigning, remain intact.

B. Appointment

The appointive system may be possessed of more notoriety than any other, given the consistently high public interest in the appointment of federal judges, especially those appointed to the United States Supreme Court. Although a few

145. Champagne, *supra* note 140, at 57; Korzen, *supra* note 2, at 269.

146. Dubois, *Accountability, supra* note 2, at 45.

147. Champagne, *supra* note 140, at 63.

148. DUBOIS, FROM BALLOT TO BENCH, *supra* note 12, at 7; Champagne, *supra* note 140, at 63; Korzen, *supra* note 2, at 269.

149. Champagne, *supra* note 140, at 63.

150. DUBOIS, FROM BALLOT TO BENCH, *supra* note 12, at 7-8.

151. Dubois, *Accountability, supra* note 2, at 45; Champagne, *supra* note 140, at 63.

152. Champagne, *supra* note 140, at 63.

153. *Id.*; Dubois, *Accountability, supra* note 2, at 45.

154. Dubois, *Accountability, supra* note 2, at 45.

states follow the federal model of executive appointment and senatorial confirmation,[155] state appointive systems are extremely diverse, and include appointment by the governor, legislature, or sitting judges,[156] and confirmation by executive councils or legislative bodies.[157]

The appointive system is greatly dependent on the appointing officer's discretion,[158] who in most instances is an elected official. Consequently, appointive systems substitute one form of political pressure for another. Although the system removes judges from electoral politics, judicial appointments become critical components in the partisan election campaigns of the appointing officer.[159] Partisan concerns, therefore, may factor into appointments, with considerations such as ideology or party loyalty overriding issues of individual merit.[160] The strength of the appointive system, however, is its maximization of judicial independence, due to the lack of any significant restraint on the judge after confirmation.[161] For those who believe that accountability should be the centerpiece of judicial selection, this is also its weakness.[162]

C. Nominating Commissions (Merit Selection)

The most recent vintage of judicial selection systems is commission selection, popularly known as the Merit Plan or the Missouri Plan, after the first state to adopt the design in 1940.[163] Commission selection was developed by reformers in the early decades of this century as a response to the populist notion that judges should be elected and subordinate to the will of the people.[164] Historians trace the roots of the plan to an address given by Roscoe Pound, then dean of the University of Nebraska law school, to the American Bar Association in 1906, entitled "The Causes of Popular Dissatisfaction with the Administration of Justice."[165] Discussing the burgeoning discontent with the elective judiciary, Pound stated: "Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."[166] This cli-

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155. Maine, New Jersey and Rhode Island select at least a portion of their judiciary in this manner. *See* THE BOOK OF THE STATES, *supra* note 56, at 210-11.

156. Champagne, *supra* note 140, at 57. For example, Alaska, Iowa, Mississippi, Ohio, and South Dakota provide for sitting judges to make appointments to various judicial offices. *See* THE BOOK OF THE STATES, *supra* note 56, at 210-11; *see also supra* note 47.

157. Champagne, *supra* note 140, at 58.

158. *Id.*

159. *Id.*

160. *See id.* For a good discussion of the politicization of the judicial branch, particularly in the federal appointment process, see James L. Robertson, *Of Bork and Basics*, 60 MISS. L.J. 439 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990)).

161. Champagne, *supra* note 140, at 58.

162. *Id.*

163. *See* Richard A. Watson, *Observations on the Missouri Nonpartisan Court Plan*, 40 SW. L.J. (Special Issue) 1, 1-2 (1986); Korzen, *supra* note 2, at 271.

164. *See* Krivosha, *In Celebration*, *supra* note 101, at 128.

165. *Id.*

166. Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure – Its Historical Development*, 7 DUQ. L. REV. 61, 64 (1968).

mate of dissatisfaction led to the founding of the American Judicature Society in 1913, and the evolution of the commission selection system.[167]

Although numerous variations exist, the system's basic structure includes a permanent non-partisan commission of lawyers and non-lawyers, appointed by various public and private officials, who recruit and screen judicial candidates.[168] In addition to lawyers and lay persons, many commissions also include a judicial member.[169] The commission submits a list of nominees, generally containing between three and five names, to the executive, who must make an appointment from the list.[170] After an initial period of service, an uncontested, non-partisan election is held, during which the sole question decided by the electorate is whether the judge should be retained in office.[171] Should a majority vote be cast for retention, the judge will serve a fixed term before facing another retention election.[172]

Advocates believe that commission selection offers several advantages over popular election of judges. First, the selection process is improved by removing the participation of political parties and interest groups, because partisan affiliation and connections are rendered irrelevant for recruitment.[173] Consequently, "[t]he absence of party primaries and reelection contests will free judges from continuous partisan political obligations, permitting them to become genuinely independent both on and off the bench and able to devote themselves full-time to their court duties."[174] Further, by directing the selection process toward professional qualifications, highly qualified and desirable candidates are more likely to permit themselves to be considered for judicial office, thus improving the overall quality of the judiciary.[175] While not promising that every judge selected will be excellent, supporters note that commission selection tends to eliminate the highly incompetent.[176] Finally, because pervasive political pressures have been removed, independence and impartiality in judicial decision-making should be enhanced, as partisan and self-protective motivations for decisions are no longer present.[177]

Commission selection is celebrated as an attractive compromise on the continuum of judicial independence and public accountability, landing somewhere be-

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167. *Id.* at 64-65. For a detailed discussion of the historical development of the commission selection system, see Krivosha, *In Celebration*, *supra* note 101; and Winters, *supra* note 166.

168. Korzen, *supra* note 2, at 271.

169. ASHMAN & ALFINI, *supra* note 53, at 26.

170. Korzen, *supra* note 2, at 271.

171. *Id.*

172. Champagne, *supra* note 140, at 61. A second major form of commission selection is referred to as the California plan. *Id.* Under this variation, instead of preparing a list of nominees, the commission enjoys veto power over the executive's nominee. *Id.*

173. Glick, *supra* note 58, at 513.

174. *Id.*

175. *Id.*

176. Watson, *supra* note 163, at 5.

177. Glick, *supra* note 58, at 513.

tween the extremes of gubernatorial appointment and partisan election.[178] Critics maintain, however, that far from eliminating politics from the process, commission selection merely substitutes "a somewhat subterranean process of bar and bench politics that is far removed from popular control."[179] Even its supporters acknowledge that no system is completely immune from political influences, and that each jurisdiction adopting commission selection has had to struggle to insure that the effect of partisan politics is limited.[180]

The foundation of commission selection is the nominating commission, rendering the effectiveness of the system greatly dependent upon the successful functioning of this body.[181] As would be expected, therefore, the greatest potential for disruptive political influence is present in the appointment, and performance, of the commissioners. Lawyer members of the commission are often appointed by governing officials of the state bar, while non-lawyer members are usually selected by the governor.[182] Critics maintain that the executive is thus able to appoint his own supporters or party loyalists, allowing partisan politics to play a heightened role in the selection process.[183] Although non-lawyer members are considered desirable to promote public involvement in the process, the system is intended to remove the executive's opportunity to make politically motivated judicial appointments.[184] It is considered a contradiction, therefore, to allow the executive a direct voice in the appointment of nominating commissioners.[185] One suggestion for remedying this problem is appointment of lay members through a bi-partisan legislative committee.[186]

The potential for political machinations within the inner workings of the commission is also a serious concern. Should the executive be able to exert a dominant influence, "pre-selection" may occur, where the favored choice of the governor is included on the submitted list.[187] The reverse occurs when commission members with political or personal goals of their own engage in "panel rigging," by submitting a list of nominees with only one legitimate candidate.[188] Philosophical differences between plaintiff and defense bars can also lead to tensions in the appointment of lawyer members to the commission and in the actual selection

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178. Champagne, *supra* note 140, at 58, 61; William M. Pearson & David S. Castle, *Alternative Judicial Selection Devices: An Analysis of Texas Judge's Attitudes*, 73 JUDICATURE 34, 34 (1989).

179. Beth M. Henschen et al., *Judicial Nominating Commissioners: A National Profile*, 73 JUDICATURE 328, 329 (1990).

180. ASHMAN & ALFINI, *supra* note 53, at 70-71.

181. *Id.* at 22.

182. *Id.* at 25.

183. Champagne, *supra* note 140, at 61; Glick, *supra* note 58, at 521.

184. ASHMAN & ALFINI, *supra* note 53, at 25.

185. *Id.*

186. *Id.* The value of including non-lawyers on the commissions has been strongly questioned. The lack of an understanding of the judicial process raises concerns that lay members are subject to undue influence by the lawyer or judicial commission members, or will simply defer to the legal expertise of others. *Id.* One method of addressing this concern is to emphasize training in the selection process for non-lawyer members prior to the initial term of service. *See* Watson, *supra* note 163, at 6.

187. Korzen, *supra* note 2, at 272.

188. McClellan, *supra* note 21, at 548.

process.[189] In an effort to avoid manipulation of the process through lobbying of commission members, including by the executive and members of the bar, reformers recommend the implementation of preventive rules and procedures.[190] These include requiring that all written communications received by one commission member be forwarded to all members, and that all oral communications with members be reduced to writing.[191] Further, in an effort to discourage "pre-selection," such rules would preclude commission members from initiating or receiving any communication from the governor concerning any candidate prior to completion of the list.[192]

Commission selection opponents have also expressed concern that the process could potentially be used to exclude women and minorities from judicial positions.[193] Supporters, however, maintain that commission selection actually provides more opportunities for women and minorities than do judicial elections.[194] One way to alleviate such fears is to promote heterogeneity among the nominating commissioners.[195] Thus, in an effort to bolster public confidence and credibility, some state systems include provisions for ethnic and gender diversity on their nominating commissions.[196] Thoughtful and careful selection of a commission's membership is the decisive factor in whether it acts in a legitimately representative and non-partisan manner.[197]

A substantial amount of criticism directed toward commission selection is reserved for its retention election component. Retention elections are an attempt to balance public accountability concerns against the measure of judicial independence provided by nominating commissions.[198] Because this form of election lacks traditional voting cues, such as party affiliation and competitive campaigning,[199] however, commentators have questioned the degree of accountability actually provided.[200] The low voter turnout typical of other types of judicial elections is an even larger obstacle in retention elections.[201] Because the judge runs only on his or her record, and not against a live opponent, retention elections do not generate the publicity necessary to allow the public to cast an informed vote.[202] There is

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189. *See* Champagne, *supra* note 140, at 61-62.

190. *See* Theodore McMillan, *Selection of State Court Judges*, 40 Sw. L.J. (Special Issue) 9, 12-13 (1986).

191. *Id.* at 12.

192. *Id.* at 12-13.

193. *See, e.g.*, Glick, *supra* note 58, at 522; Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 230 (1987).

194. *See, e.g.*, McMillan, *supra* note 190, at 10; Krivosha, *Merit Selection*, *supra* note 79, at 19.

195. *See* ASHMAN & ALFINI, *supra* note 53, at 228; *Judicial Nominating Commissions — The Need for Demographic Diversity*, 74 JUDICATURE 236, 236 (1991)[hereinafter *Judicial Nominating Commissions*].

196. *Judicial Nominating Commissions*, *supra* note 195, at 236.

197. *See* ASHMAN & ALFINI, *supra* note 53, at 227-28.

198. *See* Hall & Aspin, *supra* note 4, at 340; *The Need for Judicial Performance Evaluations for Retention Elections*, 75 JUDICATURE 124, 178 (1991).

199. Hall & Aspin, *supra* note 4, at 340.

200. *See, e.g.*, Champagne, *supra* note 140, at 62; McClellan, *supra* note 21, at 549.

201. Hall & Aspin, *supra* note 4, at 342.

202. *Id.*

also apprehension that low voter participation allows well-organized special interests to control retention elections, creating the possibility that judges will rely on such groups for campaign funding.[203] One way to increase the expectation that voters will cast an informed ballot, thus improving the effectiveness of retention elections, is for state bar associations to assist the public by providing information on judicial candidates.[204]

V. MISSISSIPPI'S FLEETING MERIT SELECTION EXPERIENCE

In most judicial election states, including Mississippi, the governor is vested with the power to fill mid-term vacancies in judicial offices by appointment.[205] It is, in fact, a common occurrence for judges in an elective system to first reach the bench by executive appointment to positions vacated because of resignation, retirement, or death within a regular term of office.[206] Many governors have voluntarily established nonbinding commission selection mechanisms to assist in making these appointments.[207] Such a system was implemented in Mississippi in 1980, when then Governor William Winter, by executive order, established the Judicial Nominating Committee for use in filling mid-term vacancies in the supreme court, and circuit, chancery, and county courts.[208] The committee continued to function during the succeeding administrations of Governors William Allain and Ray Mabus,[209] but was not revived, however, following the election of Governor Kirk Fordice in 1991.[210]

The committee as established by Governor Winter consisted of nineteen members who served staggered three-year terms.[211] Six members were appointed by the governor from each of the three supreme court districts, as well as a nineteenth member who chaired the committee.[212] Three members from each district were required to be lawyers, whose appointments were recommended to the governor by the president of the Mississippi State Bar.[213] The remaining members from each district could be, but were not required to be, lawyers.[214] It was requisite that the

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203. *Id.*

204. *Id.* at 342-43; Watson, *supra* note 163, at 6.

205. *See* DUBOIS, FROM BALLOT TO BENCH, *supra* note 12, at 5; *supra* note 52 and accompanying text.

206. W. St. John Garwood, *Judicial Revision – An Argument for the Merit Plan for Judicial Selection and Tenure*, 5 TEX. TECH L. REV. 1, 4-5 (1973).

207. DUBOIS, FROM BALLOT TO BENCH, *supra* note 12, at 5.

208. Miss. Exec. Order No. 334 (Gov. William F. Winter, Aug. 27, 1980) (on file with author).

209. Interview with Luther T. Munford, former Judicial Nominating Committee member, in Jackson, Miss. (June 19, 1992) [hereinafter Munford Interview].

210. Telephone interview with R. Andrew Taggart, Chief of Staff, Office of Governor Kirk Fordice (Aug. 31, 1992). Although he considers the former nominating committee a commendable effort to eliminate partisan politics from the appointive process, Governor Fordice is of the view that judicial appointments are uniquely the role of the executive, and that bar and bench politics often associated with such committees render them an undesirable method of selection. *Id. See supra* note 179 and accompanying text. Alternatively, prior to exercising his appointment authority, Governor Fordice actively solicits applications and recommendations from lawyers and other interested groups in the jurisdiction in which the vacancy occurs. Taggart interview, *supra*.

211. Exec. Order No. 334, *supra* note 208.

212. *Id.* ¶ 2.

213. *Id.* ¶ 2(c).

214. *Id.* ¶ 2(b).

committee chair be a lawyer and have previously served on the committee for at least one year.[215] The vacancy created was filled by appointment of a new member from the same district.[216] In an effort to avoid the appearance of internal lobbying, no committee member was eligible for appointment to judicial office or reappointment to the committee until one year following either resignation or completion of his or her term.[217]

In considering vacancies on the supreme court, the entire committee membership sought and evaluated applications of potential nominees.[218] Circuit, chancery, and county court openings, however, were reviewed by a sub-committee, comprised of the six members appointed from each supreme court district, responsible for the jurisdiction in which the vacancy occurred.[219] Upon occurrence of a vacancy, the committee, or the appropriate sub-committee, solicited applications through notification of newspapers, the state and local bar associations, court clerks, and any other bar or citizen organization deemed appropriate.[220] Applicants then submitted completed questionnaires containing background information from which the committee chair, or sub-committee chair, screened out unqualified applicants.[221] The committee obtained additional information through investigations and personal interviews to assist in evaluating the candidates' qualifications.[222]

Nominees were required to be certified by the committee as "fully qualified" before being recommended to the governor.[223] To make this certification, the committee had to find that the nominee possessed (1) all qualifications required by law for the particular office,[224] and (2) "the personal qualities and attributes of character and experience, judicial temperament, professional competence and other personal characteristics essential to the particular judgeship involved necessary to fully qualify a person to serve the public as a judicial officer."[225] Following the investigatory and deliberative processes, the committee selected and recommended for appointment three nominees for vacancies in circuit, chancery, and county courts, and five nominees for supreme court vacancies.[226] Because the

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215. *Id.* ¶ 2(d).

216. *Id.*

217. *Id.* ¶ 3.

218. *Id.* ¶ 7.

219. *Id.* ¶¶ 4-5.

220. *Id.* ¶¶ 5, 7; Operating Rules of the Judicial Nominating Committee and Sub-Committees, ¶ 15 (adopted under authority of Miss. Exec. Order No. 334) (on file with author).

221. Operating Rules, *supra* note 220, ¶¶ 17-18. However, panel members received the names of all applicants and could bring up for review any candidate eliminated in the initial screening process. *Id.* ¶ 18.

222. *Id.* ¶¶ 19-20, 23. For example, the investigation would attempt to "determine from reliable sources" the capability of applicants to administer justice without regard to race, color, gender, religion, national origin, or financial standing. *Id.* ¶ 20.

223. Exec. Order No. 334, *supra* note 208, ¶ 9.

224. *See supra* notes 47 and 50 and accompanying text.

225. Exec. Order No. 334, *supra* note 208, ¶ 8.

226. *Id.* ¶¶ 6-7.

committee's recommendations were nonbinding, the governor had the right to reject any or all of the nominees.[227]

Governor Allain utilized the nominating system as it had been established by his predecessor.[228] Following his election in 1987, however, Governor Mabus issued a new executive order altering the system in certain areas, but which left the committee's basic structure intact.[229] The separate post of committee chair was eliminated, reducing the committee membership to eighteen, one of whom was appointed to chair the committee.[230] The time period for the committee to make its recommendations was expanded from ten to thirty days, and voting procedures were simplified.[231] Further, the order mandated that the governor and the president of the state bar insure that the committee's membership was not limited to a particular race, gender, or interest group.[232] The operating rules promulgated under the order's authority made other significant improvements in the committee's operation. For example, a provision establishing procedures in the event of a conflict of interest was included,[233] and, where the former operating rules had simply stated that members were not prevented from soliciting applications from persons they believed to be qualified for judicial office, language in the new rules encouraged members to actively seek out persons of the highest qualifications and invite their applications.[234]

Although the Judicial Nominating Committee enjoyed a relatively brief existence, it represented a significant change in Mississippi's method of judicial selection. Unlike partisan election, it provided a mechanism for an in-depth review of a candidate's qualifications *prior* to that person ascending the bench. Of greater import, it eliminated the electoral risk of a skillful or well-connected, but otherwise professionally unqualified, politician achieving judicial office. By providing the benefit of its collective professional judgment, the committee also acted as a check, albeit a voluntary one, on the executive's usually uncurbed appointment power. Judges reaching the bench through the committee process, however, received only a temporary reprieve from the omnipresent political pressures of Mississippi's judicial election system. Because these judges were required to win a partisan election to retain their office,[235] the short-lived committee was unable to serve the judiciary's need for independence. For example, when appointed to the

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227. *Id.* ¶ 11.

228. Munford interview, *supra* note 209.

229. Miss. Exec. Order No. 587 (Gov. Ray Mabus, March 18, 1988) (on file with author). This order is included in the appendices at the end of this article.

230. *Id.* ¶¶ 2-3.

231. *Id.* ¶¶ 10-11. *Compare* Operating Rules, *supra* note 220, ¶ 24 *with* Operating Rules of the Judicial Nominating Committee, ¶ 8(c) (adopted under authority of Miss. Exec. Order No. 587) (April 30, 1988) (on file with author). The rules promulgated pursuant to Executive Order No. 587 are also included in the appendices following the article.

232. Exec. Order No. 587, *supra* note 229, ¶ 2(c).

233. *Id.* ¶ 4(b).

234. *Id.* ¶ 4(e); Exec. Order, *supra* note 208, ¶ 16.

235. *See supra* note 52 and accompanying text.

supreme court by Governor Winter in 1983, former Justice Robertson received one of the highest ratings ever given by the Judicial Nominating Committee.[236] The committee's collective professional judgment regarding Justice Robertson's qualifications, however, was obviously of little assistance in the heat of a highly partisan election campaign.

VI. CONCLUSION: A SUGGESTION FOR CHANGE

Although the design of judicial selection systems often reflects the struggle to balance majoritarian rule with the need for judicial independence, Mississippi has made no attempt to compromise between these principles. Instead, by providing for its judges to be selected and retained by partisan election, Mississippi emphasizes public accountability to the exclusion of judicial independence. The judiciary's role as a check on legislative and executive power, and as protector of individual rights and liberties, however, requires some measure of insulation from self-indulgent partisan interests and transient popular politics: This needed protection is not provided through election of judges. Indeed, the Jacksonian "experiment" of elective judiciaries is widely perceived as a failure that has simply served to undermine judicial independence.[237]

Unless the importance of an independent judicial branch is recognized, Mississippi can expect further politicization of its judiciary. It cannot continue to require judges to compete for popular support in the arena of public opinion, as do executives, legislators, and other politicians, and avoid devastating consequences to judicial decision-making. It would be sad irony if Mississippi's reinforcement of democratic ideals through judicial elections created a judiciary in which the need to win reelection overrides impartial application of the rule-of-law, and where distortive and manipulative electioneering for judicial office is casually accepted.

It is submitted, therefore, that Mississippi, a state often slow to accept change, needs to abandon its antiquated method of selecting judges by partisan election, as a majority of states have already done.[238] This does not necessarily require, however, adoption of a system emphasizing judicial independence to the exclusion of public accountability. One need look only to the federal model of executive appointment, senate confirmation, and life tenure, to realize that partisan influences are not eliminated simply because a selection system places a high premium on independence. Such a system merely substitutes other, perhaps equally dangerous, political forces. The evolution of commission selection, however, has demon-

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236. *Re-elect Robertson, supra* note 105, at 2.

237. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 14 (1990).

> If not from God or nature, where could the common law have come from but from the judges themselves? That would make them legislators – unelected ones, to boot. Many of our states confronted this possibility head on, by making their judiciaries elective. But this experiment merely undermined judicial independence and encouraged the perception (at times self-perception) of judges as nothing more than legislators in robes . . . . *Despite its persistence, the concept of an elective judiciary is generally and correctly regarded as a failure.*

Id. (emphasis added).

238. *See supra* notes 56-58 and accompanying text.

strated the greatest ability to reinforce both independence and accountability, while simultaneously striving to eliminate, to the extent possible, the dangerous effects of partisan politics.

Although termed an "awkward compromise,"[239] commission selection offers Mississippi its best opportunity to tailor a system emphasizing professional qualifications, competence, and integrity, and de-emphasizing politics. The work begun by the administration of Governor Winter, and continued during the tenure of Governor Mabus, provides a commendable foundation for such an effort. Converting the Judicial Nominating Committee to a permanent selection tool would require significant alterations, however, including provisions lessening, or eliminating, the governor's control over the appointment of its membership. Strict provisions against lobbying efforts, including by the executive, directed toward members are also necessary to allow the committee to function independently. Furthermore, to allow Mississippi citizens to play an informed and effective role, any retention election component must be accompanied by a strong presence by the state bar in providing voters with meaningful information. Although no selection mechanism is a complete panacea, a carefully established and monitored system of commission selection will go a long way toward freeing Mississippi's judges from the stranglehold of partisan politics, while providing for a highly qualified and independent judiciary.

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239. Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1561 (1988).

Appendices

APPENDIX "A"

Executive Order No. 587[1]

The maintenance of a strong and viable judiciary is essential to the protection of the rights and freedoms of the citizens of the State of Mississippi.

Under the constitution and laws of the State of Mississippi, the Governor is authorized to fill by appointment certain vacancies in judicial office.

It is my firm belief that only the most qualified, conscientious, and dedicated persons available should be appointed to serve the public as judicial officers.

As a result, I, Ray Mabus, Governor of the State of Mississippi, under and by virtue of the constitution and laws of this state, do hereby promulgate the following Executive Order effective immediately. All previous Executive Orders previously issued pertaining to the Judicial Nominating Committee or the subject matter of this Executive Order are superseded and rescinded.

1. There is created and established by this Executive Order an advisory council to be known as the Judicial Nominating Committee. It shall be the responsibility of the Judicial Nominating Committee to consider all applications for nominations and to nominate, in accordance with this Executive Order, persons qualified and eligible to fill vacancies in the Supreme Court, in the respective Chancery and Circuit Courts and the respective County Courts of the State of Mississippi.
2. The Judicial Nominating Committee shall consist of 18 members to be appointed as follows:
   a. The Governor shall appoint three members from each Supreme Court district who shall be citizens of the State of Mississippi and may be, but need not be, practicing attorneys at law. These members shall be known as "Governor's committee members".
   b. The Governor shall appoint three additional members from each district from a list of persons recommended for appointment by the President of the Mississippi State Bar, who shall be members of the Mississippi State Bar who are practicing attorneys at law. These members shall be known as "Bar committee members".
   c. In making appointments or nominations, the Governor and the President of the Mississippi State Bar shall endeavor to create and to maintain a nominating commission whose membership is not limited to a particular race, sex, or interest group.
3. The Governor shall appoint one member of the Judicial Nominating Committee to serve as its chairman. The appointment of the chairman shall be for a period of one year, and may be renewed.

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1. Miss. Exec. Order No. 587 (Gov. Ray Mabus, March 18, 1988) (on file with author).

4. Governor's committee members shall serve terms fixed in advance by the Governor which terms shall not exceed the appointing governor's term of office.
5. Bar committee members shall initially be appointed for staggered terms for one, two, or three years. Upon expiration of the term of any Bar member, the Governor shall appoint a successor Bar committee member for a term of three years.
6. When a vacancy occurs on the committee due to the resignation, disability, or death of a member, a successor shall be chosen by the Governor for the unexpired term in the same manner as was used to choose the member to be replaced.
7. No member of the Judicial Nominating Committee shall be eligible for appointment to judicial office or reappointment to the nominating committee until after the expiration of one year from the date of the member's resignation or completion of the member's term.
8. The Governor shall designate an ex-officio Secretary, to serve at the Governor's will and pleasure, who shall be responsible for maintaining the records of the nominating committee.
9. The six members appointed from each Supreme Court District shall constitute a subcommittee, each bearing the number of the Supreme Court District they serve. The chairman of the Judicial Nominating Committee shall serve as ex-officio chairman of each subcommittee, or may appoint a member of that subcommittee to serve as its chairman.
10. Wherever a vacancy occurs in a Circuit, Chancery, or County judicial office, upon the call of the Governor, the subcommittee whose jurisdiction embraces the judicial district of the office shall meet to consider the qualifications and eligibility of all proposed nominees for appointment. The subcommittee shall seek, receive, and review applications and other information concerning the qualifications and eligibility of nominees. The subcommittee shall notify the Bar Associations and other such organizations, as the subcommittee shall deem appropriate, of the existence of such vacancy and of the nomination procedure to be followed by the subcommittee, and shall request nominations. The subcommittee may seek and receive recommendations from other interested citizens and groups.
11. By not later than 30 days after the call by the Governor, the subcommittee shall meet, evaluate, select, certify as qualified, and recommend for gubernatorial appointment three nominees for each vacancy in each judicial office. However, where the judicial district from which the vacancy may be filled has less than 40 attorneys who actively practice in law, as shown by the most recent records of the Mississippi State Bar, the subcommittee may recommend for appointment less than three persons for each vacancy.
12. Anything contained in the foregoing paragraphs to the contrary notwithstanding, whenever there is a vacancy in the Supreme Court of the State of Mississippi, the entire Judicial Nominating Committee shall seek, receive,

and review applications as outlined above and shall meet to consider such vacancy and upon consideration of the applicants, shall select five nominees for such vacancy in the Supreme Court of the State of Mississippi.

13. No nominee shall be certified as qualified by a nominating subcommittee or the Nominating Committee as a whole unless the committee or subcommittee finds affirmative evidence that the nominee meets the following qualifications:
    a. That the nominee possesses all of the qualifications provided by law for the judicial office involved.
    b. That the nominee possesses the personal qualities and attributes of character and professional competence, high ethical standards, and other personal characteristics necessary to qualify a person to serve the public in the judicial office to which the nomination is made.
14. If any nominee shall be rejected by the Governor or shall notify the Governor of their unwillingness or inability to accept appointment, the Governor may request the Nominating Committee or subcommittee to submit additional nominees.
15. With the approval of the Governor, the Committee shall adopt such operating rules, forms, and notices as it may from time to time deem necessary.
16. All applications and information received from or concerning nominees and all proceedings of the Nominating Committee shall be held strictly confidential.
17. Nothing in this order is intended to in any way impair or delegate the constitutional and statutory duties or prerogatories of the Governor in the filling of vacancies of judicial office by appointment. The right to reject any or all of the nominees so selected and recommended is reserved unto the Governor.

(Original signed by Governor Ray Mabus on March 18, 1988)

APPENDIX "B"

Operating Rules of the Judicial Nominating Committee[2]

The following operating rules are hereby adopted by the Mississippi Judicial Nominating Committee in accordance with the authority of paragraph 15 of Executive Order No. 587 issued by Ray Mabus, Governor of the State of Mississippi, on March 18, 1988.

The word "committee" when used in these rules refers to the Judicial Nominating Committee if the vacancy being filled is on the Supreme Court and to the appropriate subcommittee of the Judicial Nominating Committee if the vacancy being filled is on a Circuit, Chancery, or County Court.

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2. Operating Rules of the Judicial Nominating Committee (adopted under the authority of Miss. Exec. Order No. 587) (April 30, 1988) (on file with author).

1. CHAIRMAN

The chairman of the committee shall preside at any meeting of the committee at which the chairman is present. In the chairman's absence the chairman shall choose another member to act as chairman.

2. SECRETARY

The secretary of the committee shall maintain the records of the committee. In the secretary's absence the chairman shall choose a person to act as secretary.

3. MEETINGS

Meetings of the committee may be called by the chairman by written notice to the other members specifying the time and place of the meeting. Meetings will normally be held in the Governor's Mansion. The chairman shall take such steps as are necessary to advise new members about the rules and procedures of the committee. A quorum of the Judicial Nominating Committee shall be twelve members.

4. MEMBERS

(a) Members of the committee shall consider each candidate for a judicial office in an impartial, objective manner.

(b) If a member knows of any personal or business relationship that the member or another member has with a candidate that may influence or appear to influence the decision of the member as to the candidate, such as a relationship by blood, by marriage, or through a law or business partnership, the member shall report that fact to the chairman. Such report shall be included in the record of the committee. If a substantial conflict of interest exists due to such personal or business relationship, the member should disqualify himself/herself from voting on that candidate.

(c) A member shall not attempt to influence the decision of another member by presenting that member with facts and opinions not relevant to the judicial qualifications of the candidates. A member shall not allow any person or organization to influence the member with any matters other than those that are relevant to the judicial qualifications of the candidates. Matters relevant to the judicial qualifications of the candidates shall include, but not be limited to, a candidate's character, experience, temperament, competence, ethical standards, health, impartiality, industry, integrity, professional skills, and the ability to abstain from politics in the performance of judicial duties. With respect to trial judges, decisiveness and speaking ability shall also be examined. When the vacancy is on the Supreme Court, members shall especially take into account collegiality and writing ability.

(d) All communications between members, between a member and a candidate, or between a member and any other person or organization with respect to the judicial qualifications of a candidate shall be kept confidential and discussed only among the members. At the conclusion of deliberations, all documents shall be returned to the secretary.

(e) Members should always keep in mind that frequently persons of the highest qualifications will not actively seek judicial appointment. Therefore, it is incumbent upon the members to seek out well qualified persons and to encourage them to

agree to accept nomination, even if a member may ultimately be unable to vote for that person's nomination.

5. SUBCOMMITTEES

(a) The six members appointed from each Supreme Court District shall constitute a subcommittee, each such subcommittee bearing the designation of the Supreme Court District. The chairman of the Judicial Nominating Committee shall serve as chairman of each subcommittee or alternatively may appoint a member of that subcommittee to serve as chairman. The chairman of the Judicial Nominating Committee shall be a voting member of each subcommittee. A quorum of a subcommittee shall be four members.

6. VOTING

The committee may act by majority vote of members present except for elimination from further consideration of candidates and in the ultimate selection of nominees.

7. CANDIDATES

(a) When a vacancy occurs, on the call of the Governor, the chairman shall cause notice of the vacancy to be given by mail to the newspapers in the county in which the vacancy exists, to the state and local bar associations, and to the court clerks requesting that the notice be posted in a public place in the office of the clerk. A questionnaire seeking background information shall be submitted to each candidate for completion and return to the secretary of the committee.

(b) After the questionnaires have been returned to the secretary, the chairman shall assign to members and the secretary responsibilities for compiling background information. Other members, whether or not assigned, may also compile background information. Background information is to be compiled by contacting individuals and institutions mentioned in the questionnaire. In addition, individuals and groups from the candidate's community may be contacted in an effort to obtain as much information as possible.

8. SELECTION OF NOMINEES

(a) After all relevant background information has been compiled, each candidate is to be interviewed by the committee. The interview may be preceded by a brief discussion of a candidate's qualifications.

(b) After the interviews have been completed, the chairman shall read the names of the candidates in alphabetical order and members shall report on the results of their investigation of that candidate. Thereafter, the chairman shall open the meeting to a discussion of that particular candidate's qualifications for judicial office. After this procedure has been followed for each candidate, the chairman shall open the meeting to a general discussion of the relative qualifications of all the candidates.

(c) Upon completion of the discussion of the candidates qualifications, the committee shall vote. Voting shall be conducted by secret ballot. Each member shall vote for (same as number to be nominated; these rules will hereafter assume this number to be three) candidates and shall list these candidates in order of preference. Upon completion of the balloting, the secretary shall tabulate the votes by

assigning three points to each candidate listed in the first position on each ballot, two points to each candidate listed in second position of each ballot, and one point to each candidate listed in third position on each ballot. The three candidates (five if the vacancy being filled is on the Supreme Court) receiving the most points shall be certified for nomination by the committee. If this procedure proves to be indecisive by reason of a tie vote, additional ballots shall be cast until the tie is broken. On ballots subsequent to the first ballot, members shall vote for only so many candidates as there remain nominees to be selected.

(d) If there are more than five candidates (eight if the vacancy being filled is on the Supreme Court) there will be an initial vote using the voting procedures described above to determine the top five (eight) candidates. Then another vote shall be taken to determine the nominees.

9. TRANSMITTAL TO THE GOVERNOR

(a) The names of the nominees, listed in alphabetical order, shall be hand-delivered to Governor Mabus.

(b) No other information shall be forwarded to Governor Mabus except that the committee, any of its members or the secretary may consult with the Governor at his request, and the committee may furnish the Governor, at his request, copies of the nominees' questionnaires and other information gathered during the investigations.