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# ARTICLE

## THE STATE OF THE MONTANA CONSTITUTION (TURKEY FEATHERS ON THE CONSTITUTIONAL EAGLE)\*

**Gregory J. Petesch\*\***

The winds of change that blew through Montana in the late 1960s and early 1970s allowed the passage of the 1972 Montana Constitution. Thirty years is not a long time in constitutional history; however, it is long enough for the dust to settle and to gain some perspective. The 1972 Montana Constitution's 30 years of existence is approximately one-third of the life span of the 1889 Montana Constitution. My job with the Montana Legislature provides me with the opportunity to work with every article of the 1972 Montana Constitution, including provisions that are almost never scrutinized in the normal practice of law. The enactment of the 1972 Montana Constitution initially afforded the Legislature the opportunity to implement a new Constitution and ultimately afforded the Montana Supreme

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\* In discussing proposed constitutional provisions governing corporations and elections for directors, Delegate J.C. Garlington said, "consistent with the principle that I think some of us have tried to advocate right along, that this Constitution is to be limited to basic, fundamental structures of government and that we should not try to stick turkey feathers into the constitutional eagle." Verbatim Transcript, Mont. Const. Convention, Volume VII, page 2260.

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Court the ability to interpret it and its implementation. The give and take of this process has heightened the dynamic tension inherent between those two branches of government. The political chinook that brought about the creation and passage of the 1972 Montana Constitution has changed direction during the last decade. It is unlikely that a Constitutional Convention convening today would mirror the actions of the 1971 Convention. It is possible that the current swirling political winds herald a cold front between the Judicial and Legislative Branches of state government and could result in increased politicalization of the Judicial Branch.

The delegates to the 1971-1972 Constitutional Convention proposed many visionary provisions, particularly in Article II of the Constitution. However, in attempting to reap the benefits of that whirlwind of visionary provisions, political reality intervened.

The governmental structure provisions of the Constitution contain constraints that were designed to pander to the elected officials of the time. The requirements that the state's counties are the counties that existed on the date of ratification and that county boundaries may not be changed until approved by a majority of those voting on the question in each affected county precludes legislative attempts to streamline this area of government.<sup>1</sup> In explaining this provision, Delegate Oscar Anderson stated that "the committee considered leaving the matter of county boundaries entirely to the Legislature, but decided that the authority would be more appropriately lodged in the people of the affected counties."<sup>2</sup> The delegates also required that counties be allowed to retain the form of government that existed in 55 of Montana's 56 counties.<sup>3</sup> In explaining this decision, Delegate Thomas Ask reminded the delegates that in working on the judicial article, the provisions related to the Clerk of Court and the County Attorney were moved to the local government article so that all county officials would be under one section.<sup>4</sup> Delegate Ask stated that most of the suggestions on this provision came from county officials who

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1. MONT. CONST. art. XI, § 2.

2. MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPTS Vol. VII, 2515 (1972).

3. MONT. CONST. art. XI, § 3, cl. 2.

4. MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPTS Vol. VII, 2518 (1972).

were concerned that they were going to lose their elected county government.<sup>5</sup> Delegate Ask also wisely noted that everything that was done either lost or gained a few votes for ratification.<sup>6</sup> He stated that by having this provision in the Constitution, the Convention would get all the help and support of all of the county officials.<sup>7</sup>

However, the provision enumerating the existing county form of government impeded the ability of the Legislature to implement Article VIII, section 3, of the Montana Constitution, requiring that the state appraise, assess, and equalize the valuation of all property that is to be taxed in the manner provided by law, and Article VIII, section 4, of the Montana Constitution, requiring all taxing jurisdictions to use the assessed valuation of property established by the state. When the 1972 Constitution was adopted, property appraisal and assessment was performed by each elected County Assessor. By allowing the retention of the County Assessor as an elected county official in 55 of Montana's 56 counties, the Constitution played a key role in the 20-year political debate over property tax reform. In a Special Session held in November 1993, the Legislature eliminated all statutory duties of the County Assessors.<sup>8</sup> That action allowed the state to finally complete the assumption of the role envisioned by Article VIII, sections 3 and 4, of the Montana Constitution and forced County Commissioners to either consolidate the office of County Assessor with another office or elect an official with no statutory duties.

The enumeration of elected county officials in Article XI, section 3, of the Montana Constitution also restricted the ability of the State to fully assume the costs of District Courts during the 2001 Legislative Session. The only District Court personnel that the State is not responsible for funding and who are not classified state employees are the Clerks of the District Court.<sup>9</sup> It is impossible to make an elected county official a classified state employee. The anomaly of an elected Clerk of the District Court in every county is further exacerbated by the fact that not

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5. MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPTS Vol. VII, 2518 (1972).

6. *Id.*

7. *Id.*

8. Act of Dec. 27, 1993, ch. 27, Nov. 1993 Mont. Laws Nov. Spec. Sess. 4096.

9. Act of May 5, 2001, ch. 585, 2001Mont. Laws 3063.

every county has a District Court Judge.<sup>10</sup> However, each county does have an elected Justice of the Peace who is not considered an elected county official within the constitutionally enumerated officials comprising the most popular form of county government, the one that existed in 55 counties in 1971.<sup>11</sup> This retention of Justices of the Peace in Article VII and their omission from Article XI, section 3, of the Montana Constitution has led to some confusion over whether Justices of the Peace are elected county officials or state officials.<sup>12</sup>

It is virtually axiomatic in government that the more funding that one level of government provides to another level of government, the more control the funding government seeks to impose over the receiving government. The gust of political wind that blew in the sweeping changes enacted by the 2001 Legislature in the areas of local government funding and District Court funding will be interesting to follow with regard to the funding-control axiom.<sup>13</sup> The autonomy promised to local governments in Article XI, section 6, of the Montana Constitution has been legislatively restricted based upon the legislative authority contained in that section, which allows the Legislature to prohibit by law the power that a self-government form of local government may exercise.<sup>14</sup> The Legislature has used this authority to keep a tight rein on local governments.<sup>15</sup> An attempt to use this authority was made in the budget-cutting special legislative session held in August 2002 in relation to the City of Helena's attempt to bring a breath of fresh air to public business places.<sup>16</sup>

As part of the adoption of the 1972 Montana Constitution, the people rejected a unicameral Legislature and retained a Legislature consisting of a House of Representatives and a Senate.<sup>17</sup> The Montana Constitution sets the size of the Legislature as a Senate of not more than 50 or fewer than 40

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10. MONT. CODE ANN. §§ 3-5-101 to 3-5-102 (2001).

11. MONT. CONST. art. XI, § 3.

12. MONT. CODE ANN. § 7-4-2504 (2001).

13. The Big Bill, ch. 574, 2001 Mont. Laws 2845; Act of May 5, 2001, ch. 585, 2001 Mont. Laws 3063.

14. MONT. CONST. art. XI, § 6.

15. See MONT. CODE ANN. §§ 7-1-112 to 7-1-114 (2001).

16. Act of Aug. 16, 2002, ch. 13, Mont. Laws Spec. Sess. 71. (Proposed reduction of a local government's entitlement share payment for enactment of an ordinance or resolution that negatively impacted a revenue source included in the entitlement share.)

17. Adoption Schedule, art. V, § 15, *in* 2 MONT. CONST. CONV. 1106 (1972-1973).

members and a House of Representatives of not more than 100 or fewer than 80 members.<sup>18</sup> The Montana Constitution provides that the term of office for a member of the House of Representatives is 2 years and that the term of office for a member of the Senate is 4 years.<sup>19</sup> The Montana Constitution also requires that one-half of the Senators are to be elected every 2 years.<sup>20</sup> The Transition Schedule for the 1972 Montana Constitution provided that if the reapportionment and redistricting plan became effective after the 1974 Legislative Session, the terms of legislators serving in that session would end December 31, 1974, and one-half of the Senators first elected would serve only 2-year terms in order to implement the requirement for electing one-half of the Senators every 2 years.<sup>21</sup>

Even though the Montana Constitution appears to give flexibility in determining the size of the Legislature, that flexibility was effectively eliminated by the first reapportionment and redistricting plan that established 100 House Districts and 50 Senate Districts. Because of the requirement to elect one-half of the Senators every 2 years, it is arguably impossible to implement the constitutional authorization to reduce the size of the Legislature to the lower numbers provided for in the Montana Constitution. The members of the 1974 Districting and Apportionment Commission decided to leave the size of the Legislature at 100 Representatives and 50 Senators because they felt it was more appropriate for the Legislature, which is the direct voice of the people, to determine whether to reduce its size prior to the next reapportionment.<sup>22</sup> The 1974 redistricting plan provided for House Districts of 6,944 people per district.<sup>23</sup> That meant that 32 counties lacked sufficient population to constitute a single House District.<sup>24</sup> The current redistricting cycle provides for

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18. MONT. CONST. art. V, § 2.

19. MONT. CONST. art. V, § 3.

20. *Id.*

21. *Id.*

22. MONTANA DISTRICTING AND APPORTIONMENT COMMISSION, REPORT OF 1973-1974, pages 72-73.

23. *Id.* at 69.

24. Blaine, Broadwater, Carter, Chouteau, Daniels, Fallon, Garfield, Golden Valley, Granite, Jefferson, Judith Basin, Liberty, Madison, McCone, Meagher, Mineral, Musselshell, Petroleum, Phillips, Pondera, Powder River, Powell, Prairie, Rosebud, Sheridan, Stillwater, Sweet Grass, Teton, Toole, Treasure, Wheatland, and Wibaux. MONTANA COUNTY STATISTICAL REPORT, CENSUS AND ECONOMIC INFORMATION CENTER,

House Districts of approximately 9,000 people.<sup>25</sup> That means that 31 counties lack sufficient population to constitute a single House District.<sup>26</sup>

Although distance and geographic size are factors that merit consideration in determining the number of counties and legislative districts, the combined effect of Article V, sections 2 and 3, and Article XI, sections 2 and 3, of the Montana Constitution effectively locked in the status quo in terms of the number of counties and legislative districts in Montana. Ultimately, the question of whether Montana citizens have too much representation is probably best left to the citizenry no matter how cumbersome the Montana Constitution makes the process for achieving change. Those levels of government coupled with the fact that Montana has 455 school districts<sup>27</sup> could lead the casual observer to conclude that Montanans love government—a conclusion belied by any casual conversation with almost any Montanan, particularly windbags.

School governance and finance is another area in which the structure required in the Montana Constitution creates a dilemma in terms of the funding-control axiom and continues to generate turbulence. The Montana Constitution states the “goal” of establishing a system of education that will develop the full education potential of each person.<sup>28</sup> The Montana Constitution also guarantees equality of educational opportunity to each person.<sup>29</sup> The Legislature is required to provide a basic system of free quality public elementary and secondary schools and is required to fund and distribute, in an equitable manner to the school districts, the state’s share of the cost of the basic

MONTANA DEPARTMENT OF COMMERCE (1996).

25. Mandatory Criteria for Legislative Districts, Minutes of Montana Districting and Apportionment Commission (Nov. 16, 2000).

26. Blaine, Broadwater, Carter, Chouteau, Daniels, Fallon, Garfield, Golden Valley, Granite, Judith Basin, Liberty, Madison, McCone, Meagher, Mineral, Musselshell, Petroleum, Phillips, Pondera, Powder River, Powell, Prairie, Sheridan, Stillwater, Sweet Grass, Teton, Toole, Treasure, Valley, Wheatland, and Wibaux. U.S. Census Bureau, 2000, available at [http://factfinder.census.gov/bf/\\_lang=en\\_vt\\_name=DEC\\_2000\\_SF1\\_U\\_GCTPH1\\_ST2\\_geo\\_id=04000US30.html](http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF1_U_GCTPH1_ST2_geo_id=04000US30.html). Jefferson and Rosebud Counties gained sufficient population to allow a representative from each of those counties, and Valley County lost sufficient population so that it could no longer support a representative.

27. NATIONAL CENTER FOR EDUCATION STATISTICS STATISTICAL ANALYSIS REPORT (1999-2000), available at [http://nces.ed.gov/pubs2001/overview/tableA\\_5\\_1.asp](http://nces.ed.gov/pubs2001/overview/tableA_5_1.asp).

28. MONT. CONST. art. X, § 1(1).

29. *Id.*

elementary and secondary school system.<sup>30</sup> The delegates debated this provision at great length and attempted to define the state role in educational funding. However, a reading of the debate can lead to the conclusion that the longer the debate lasted, the more confused the issue became.<sup>31</sup> What is clear is that the delegates were concerned about the lack of funding for the existing foundation program and the need on the part of the Legislature to make education funding a priority. The debate over the appropriate level of funding and the source of that funding continues to rage and is almost certain to spawn additional litigation. School funding was immediately addressed by the 1973 Legislature. In implementing the new constitutional provisions governing public school funding, the Legislature enacted Chapter 355, Laws of 1973, which required each county to levy a basic 40-mill property tax for elementary and secondary schools.<sup>32</sup> The legislation required that tax proceeds in excess of those needed by a particular county were to be remitted to the state and redistributed through the school foundation program.<sup>33</sup> That legislation was immediately challenged.<sup>34</sup> The Montana Supreme Court noted that Article X, section 1(3), of the Montana Constitution was silent as to the method of funding the state's share of the basic elementary and secondary school system. The Court observed that the Legislature had elected to employ a statewide property tax to meet the obligation. The Court stated:

While the wisdom of that legislative choice may be questioned, its constitutional validity may not. That other sources of revenue may be available, such as severance, excise and sales taxes as suggested, is true. But, the legislature has chosen property taxes to the dismay of many property owners.<sup>35</sup>

In 1988, District Court Judge Henry Loble held that the state's failure to fund the foundation program at original levels (80%) had led to disparities and inequities among school districts with regard to tax burdens, educational expenditures,

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30. *Id.* at § 1(3).

31. MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPTS Vol. VI, pages 1960-1988 (1972).

32. 1973 Mont. Laws, ch. 355.

33. *Id.*

34. *State ex rel. Woodahl v. Straub*, 164 Mont. 141, 520 P.2d 776 (1974).

35. *Id.* at 149.

and educational opportunities.<sup>36</sup> The opinion stated that the decline in foundation program support with a corresponding increase in voted levy dependence was the fundamental problem of Montana school finance.<sup>37</sup> The District Court held the school funding system unconstitutional.<sup>38</sup> On appeal, the Montana Supreme Court determined that the guarantee of equality of educational opportunity applies to each person in the state and is binding on all branches of government, whether at the state, local, or school district level.<sup>39</sup> As a result of the failure to adequately fund the foundation program, thereby forcing an excessive reliance on permissive levies, the state failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed under the Montana Constitution.<sup>40</sup> Spending disparities among Montana school districts further resulted in a denial of equality of educational opportunity.<sup>41</sup> Thus, the 1985-1986 system of funding public elementary and secondary schools was a violation of Article X, section 1, of the Montana Constitution.<sup>42</sup> The Montana Supreme Court concluded that the statewide accreditation standards adopted by the Board of Public Education: (1) are the minimum standards that do not fully define a quality education; (2) are minimum standards upon which a quality education must be built; and (3) do not fully define either the constitutional rights of students or the constitutional responsibilities of the state for funding its public elementary and secondary schools.<sup>43</sup>

The tempestuous debate over adequate levels of state funding for the public elementary and secondary school system continues to gust and is not aided by the multiple levels of responsibility for governing education that are embodied in the Montana Constitution. The Montana Constitution provides for a

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36. See *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 51, 769 P.2d 684, 688 (1989).

37. *Id.*

38. See *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 51, 769 P.2d 684, 688 (1989).

39. *Helena Elementary School District No. 1*, 236 Mont. at 52-53, 769 P.2d at 689-690.

40. *Id.* at 52-53, 769 P.2d at 690.

41. *Id.* at 55, 769 P.2d 684, 690.

42. *Id.*

43. *Id.* at 57, 769 P.2d 684, 690.

Superintendent of Public Instruction.<sup>44</sup> The Superintendent of Public Instruction is required to be elected at a general statewide election.<sup>45</sup> The Superintendent of Public Instruction is required to be at least 25 years old at the time of election and to have the educational qualifications provided by law.<sup>46</sup> The duties of the Superintendent of Public Instruction are to be provided by law, and the only constitutional roles of the Superintendent of Public Instruction are to serve as a member of the Board of Land Commissioners<sup>47</sup> and to serve as an ex officio nonvoting member of the Board of Public Education.<sup>48</sup>

The Montana Constitution also provides for a State Board of Education composed of the Board of Regents of Higher Education and the Board of Public Education. The State Board of Education “is responsible for long-range planning, and for coordinating and evaluating policies and programs for the state’s educational systems.”<sup>49</sup> The Board of Public Education is required to exercise “general supervision over the public school system” and to carry out other duties that are provided by law.<sup>50</sup> It is arguable that the “general supervision” authority of the Board of Public Education is intended to include the authority to adopt “accreditation standards” that the Legislature is required to fund at the state level. However, it would be difficult to argue that the constitutional authority of the Board of Public Education is equivalent to the constitutional authority of the Board of Regents of Higher Education.<sup>51</sup> The comments of Delegate Rick Champoux, in presenting the proposed Article X, section 9, of the Montana Constitution, also stress the elimination of the word “control” from the authority of the Board of Public Education and express the difficulty in arguing that the proposed constitutional language granted additional power to the Board at the expense of local school boards.<sup>52</sup> The discussion on proposed Article X, section 10, of the Montana

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44. MONT. CONST. art. VI, § 1.

45. *Id.* at § 2.

46. *Id.* at § 3(1), (2).

47. MONT. CONST. art. X, § 9(1).

48. *Id.* at § 9(3)(b).

49. *Id.* at § 9(1).

50. *Id.* at § 9(3)(a).

51. *Id.* § 9(2), construed in *Board of Regents v. Judge*, 168 Mont. 433, 450, 543 P.2d 1323, 1333 (1975).

52. MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPTS vol. VI, 2051, 2097 (1972).

Constitution (which was ultimately encompassed in Article X, section 9) also noted that under the law in effect in 1971, the duties of the Superintendent of Public Instruction and the Board of Public Education were prescribed by law and the proposal would leave the situation intact.<sup>53</sup>

However, in a 1992 District Court Opinion, District Court Judge Jeffrey Sherlock held that the Board of Public Education has constitutional rulemaking authority that is self-executing and that is independent of any authority granted by the Legislature.<sup>54</sup> Judge Sherlock relied upon the “general supervision” language of the Article X, section 9(3), of the 1972 Montana Constitution and determined that the plain meaning of the language applied and declined to consider contrary evidence contained in the Verbatim Transcript.<sup>55</sup> In addition, the “supervision and control” of schools in each district is vested in a Board of Trustees that is elected as provided by law.<sup>56</sup> The 1989 level of spending disparities could not be described as resulting from this “local control”.<sup>57</sup> The Montana Constitution requires an additional level of administration by making the County Superintendent of Schools a constitutionally enumerated county official.<sup>58</sup> Of necessity, each constitutionally required level of administration for the public elementary and secondary schools adds administrative costs that have to be accounted for in the ongoing school funding issue. While these costs may be minimal in the overall magnitude of school funding, the required levels of administration act as a limit on legislative ability to streamline the administration of public schools. The constitutionally required structure of administering the basic system of public elementary and secondary schools arguably limits the ability of the Legislature to implement the funding-control axiom discussed in relation to local governments.

While the 1972 Montana Constitution is deserving of much of the acclaim that it has been and is still being accorded, it should not be viewed as something that it is not. The 1972

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53. *Id.* at 2097.

54. *Mont. Bd. of Pub. Educ. v. Mont. Admin. Code Comm.*, No. BDV-91-1072 (1<sup>st</sup> Jud. Dist. 1992).

55. *Id.*

56. MONT. CONST. art. X, § 8.

57. *Helena Elementary Sch. Dist. v. State*, 236 Mont. 44, 54, 769 P.2d 684, 690 (1989).

58. MONT. CONST. art. X § 3(2).

Montana Constitution has hardly remained sacrosanct. Almost before the ink was dry, Montanans began changing the document by constitutional referendum and the newly granted power to amend the Montana Constitution by initiative. In the past 30 years the following revisions have occurred: Article II, section 14, has been amended twice; Article II, section 18, has been amended; Article II, section 28, has been amended; Article IV, section 7, was enacted; Article IV, section 8, was enacted; Article V, section 14, has been amended; Article VI, section 10, has been amended twice; Article VII, section 8, has been amended; Article VII, section 9, has been amended; Article VII, section 11, has been amended twice; Article VIII, section 13, has been amended twice; Article VIII, section 15, was enacted; Article VIII, section 16, was enacted; Article IX, section 2, has been amended; Article IX, section 5, was enacted; Article XI, section 9, has been amended; Article XII, section 3, has been amended; Article XII, section 4, was enacted; and Article XIII, section 3, was repealed.<sup>59</sup> In addition, the Montana Supreme Court has invalidated two constitutional initiatives approved by the voters.<sup>60</sup> Voter approval of twenty-five constitutional changes in 30 years has to be considered a large number particularly in light of the requirement that proposed constitutional amendments must be voted on at the general election held in November of each even-numbered year.<sup>61</sup> Voters will have the opportunity to consider four additional changes in November 2002.<sup>62</sup> This steady breeze of constitutional revision contrasts with 37 changes to the 1889 Montana Constitution during its 82-year history. The apparent ease in amending the

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59. MONT. CONST. art. II, §§ 14, 18, 28; MONT. CONST. art. IV, §§ 7, 8; MONT. CONST. art. V, § 14; MONT. CONST. art. VI, § 10; MONT. CONST. art. VII, §§ 8, 9, 11;; MONT. CONST. art. VIII, §§ 13, 15, 16; MONT. CONST. art. IX, §§ 9, 5; MONT. CONST. art. XI, § 9; MONT. CONST. art. XII, §§ 3, 4; MONT. CONST. art. XIII, § 3. (Please note there is no record of art. XIII, § 3 ever existing in Montana.)

60. *Marshall v. State of Montana*, 1999 MT 33, ¶ 24, 293 Mont. 274, ¶ 24, 975 P.2d 325, 331 (1999), (overturning CI-75 due to failure to allow a separate vote for each Constitutional amendment, violating Art. XIV, § 11), and *State ex rel. Montana Citizens for the Preservation of Citizens' Rights v. Waltermire*, 227 Mont. 85, 99, 738 P.2d 1255, 1264 (1987) (declaratory judgment rejecting CI-30 "because of material constitutional defects in the manner it was presented to the electors for a vote.")

61. MONT. CODE ANN. § 13-1-104 (2002) (implementing MONT. CONST. art. XIV, §§ 8, 9).

62. MONT. CONST. art. VIII, § 13 (Proposed amendment CI 36, 2002); MONT. CONST. art. III, § 7 (Proposed amendment CI 37, 2002); MONT. CONST. art. III, §§ 4, 7 (Proposed amendment CI 38, 2002); MONT. CONST. art. VIII, § 13 (Proposed amendment CI 39, 2002).

1972 Montana Constitution may be one of its enduring legacies.

The current political winds are even buffeting some of the visionary provisions contained in Article II of the 1972 Montana Constitution. The national security frenzy spawned by the terrorist attacks on September 11, 2001, has raised issues concerning Article II, section 9, of the 1972 Montana Constitution. Because individual privacy is the only exception to the right to observe the deliberations of governmental bodies and the right to examine government documents, it would appear that closing certain security-related meetings and withholding certain security information from the public would violate Montana's constitutional requirement for open government. This issue is likely to come before the 2003 Legislature.

One thing is absolutely certain in Montana—the wind will blow. Those Montana winds will include the political winds that continue to shape the 1972 Montana Constitution. Hopefully, the ever-present political winds are not “the ill wind which blows no man to good”.<sup>63</sup> Will the constitutional eagle be able to soar above the political winds and avoid implants of turkey feathers that could impede its flight or even ground it? From which direction will the wind come? Will the answers be blowing in the wind, or will we all be left to ponder Jerry Jeff Walker's mournful lament? Stay tuned to the weather report.

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63. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act. 5, sc. 3.