
January 1987

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Recommended Citation

Richard A. Watson, *Observations on the Missouri Nonpartisan Court Plan*, 40 Sw L.J. 1 (1987)
<https://scholar.smu.edu/smulr/vol40/iss6/3>

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OBSERVATIONS ON THE MISSOURI NONPARTISAN COURT PLAN

by

Richard A. Watson

NO other public official is chosen by so many different methods as are our state judges. Two systems utilized by the original thirteen states were appointment by the governor, usually subject to confirmation by a council or upper branch of the state legislature, and selection by the state legislature itself. These two methods still prevail in those thirteen states today.¹ Other states that came into the Union later tended to adopt the partisan election of judges, particularly as the Jacksonian Revolution came to represent the dominant political philosophy of the time. Still later, certain states, particularly in the Midwest and West, fell under the influence of the Progressive movement and used nonpartisan ballots to choose judges along with other public officials.

Despite the differences in these methods, all four are based on the assumption that persons who occupy judicial positions are like other public officials and, therefore, should be chosen by political figures, such as governors or legislators, or should be elected directly by the people. None of the methods recognizes the fact that judges are unique in the sense that a special group in society, lawyers, know more about them than other people do and profess² a special competence in choosing them.

Recognition of that fact has been slow in coming. Benjamin Franklin suggested at the Constitutional Convention that the delegates consider a method of judicial selection that he understood was used in Scotland, whereby judges were nominated by lawyers “. . . who always selected the ablest of the profession in order to get rid of him and share his practice [among themselves].”³ Franklin’s comment was perhaps facetious; in any event, it was not seriously considered, despite the fact that thirty-four of the fifty-five delegates were lawyers. Almost a century passed before the first bar association was established in New York City in 1870 with the principal purpose of doing something about Boss Tweed’s control of the courts there. Another seventy years passed before the Bar became an influential force in judicial selection with

1. All the states that presently use either of these two methods to select judges were included in the original Thirteen Colonies.

2. Everett C. Hughes suggests that professions profess. “They profess to know better than others the nature of certain matters.” See Hughes, *Professions*, XCIJ DAEDALUS 656 (Fall 1963).

3. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 120 (M. Farrand ed. 1911).

Missouri's adoption in 1940 of the Nonpartisan Court Plan (also known as the "Merit" and "Missouri" Plan). Since that time Missouri, the "Show-Me" State, has become the "Show-Them" State as some thirty-five other jurisdictions have adopted some form of the Nonpartisan Court Plan for all or a portion of their courts.

The observations on the Plan that follow are derived primarily from an intensive study of the first quarter century of the Plan's operation, which my colleagues and I published in 1969.⁴ In the last six months two separate groups in Missouri have been looking into the Plan's operation in recent years. One is a Missouri State Senate Interim Committee on the Nonpartisan Court Plan, which consists of three Democrats and two Republicans (none of whom are lawyers) and is chaired by Senator Roger Wilson. The other group is a Special Committee of the Missouri Bar Association, which is chaired by former State Supreme Court Justice James A. Finch, Jr. and which consists of six lawyers and three lay persons who were appointed to review and evaluate the Court Plan. While some of the findings and recommendations of these two groups⁵ are incorporated here, the content of this overview draws primarily from the earlier period of the Plan's operation (1940-1964).

Briefly, the Nonpartisan Court Plan provides for a nominating commission consisting of lawyers elected by lawyers, lay persons appointed by the governor, and an appellate judge who serves as *ex-officio* chair. Separate commissions exist for each of the circuit courts of the five counties in the state that use the Plan to choose their lower court judges. An appellate commission nominates persons to the three intermediate courts of appeal and to the supreme court. Each of the commissions nominates three persons for each judicial vacancy, and the governor must make an appointment from that list of three. After one year of service on the bench, each of the judges appointed under the Plan goes before the people at the next general election. To stay in office, the judge must receive a majority of "yes" votes from those voters casting a ballot on the issue of whether he or she should be retained in office.

It should be noted that four distinct kinds of interests are represented in the selection and tenure process. Included are lawyers, who sit on the nominating commissions; judges, who serve as *ex-officio* chairs of the commissions; the governor, who appoints lay persons to the commissions and who also makes the ultimate appointment; and finally, members of the general public, who are represented by the lay persons on the commissions and who also vote on whether judges selected under the Plan should be retained in office. Thus, the Plan combines the political elements of traditional selection systems for public officials, namely, the governor and the general electorate,

4. R. WATSON & R. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* (1969).

5. MISSOURI SENATE INTERIM COMMITTEE, *REPORT ON THE NONPARTISAN COURT PLAN* (Jan. 24, 1986); MISSOURI BAR ASSOCIATION COMMITTEE TO REVIEW AND EVALUATE THE MISSOURI NONPARTISAN COURT PLAN, *REPORT TO THE BOARD OF GOVERNORS OF THE MISSOURI BAR* (Jan. 15, 1986).

with participants representing the legal community, namely, lawyers and judges.

Our analysis of the Plan focused first on the particular concerns and interests that each of these four groups had in the kinds of persons who become judges. It was assumed that all of them wanted what they perceived to be "good" judges, but that their disparate backgrounds would lead them to emphasize different considerations. Personal interviews with over 200 persons involved in the process demonstrated that these four groups did look at judicial selection from quite different perspectives.

Lawyers are interested in judgeships for several reasons. Some are interested themselves in becoming a judge or hope that some of their personal friends will be chosen for the bench. Trial attorneys want judges who are not only competent but who also do not belittle them in front of other lawyers, witnesses, and the courtroom public, or who do not press them to trial before they feel they are adequately prepared. Attorneys also want as judges persons they feel will be sympathetic to their clients' interests. This is particularly true of plaintiffs' attorneys who represent injured persons in personal injury cases, and defendants' attorneys who represent insurance companies and corporations being sued in such cases. In fact, this split in the Bar was so salient in Missouri at the time of our study that the two groups ran opposing candidates for lawyer members of both the circuit and appellate nominating commissions.

Judges have a keen interest in who goes on the bench; they want persons to be chosen who will add to the prestige of the judiciary. Those who occupy seats on the same court as the one for which candidates are being considered are concerned with the ability of new judges to absorb their fair share of the case load and with whether the new judges will be amiable colleagues. Justices of the Court of Appeals and Supreme Court, which are collegial bodies, are frequently concerned with issuing unanimous decisions as a means of manifesting the certainty of the law. These judges, therefore, value persons who hold views on basic issues similar to their own and who are the kinds of individuals who are willing to compromise differences that exist in the interest of the judicial "team."

Governors are primarily interested in using judgeships to reward political friends and supporters. Judgeships are also available as potential bargaining tools to obtain support for the governor's legislative program or in lining up backing for future campaigns for public office. At the same time, governors want to appoint persons who will make them look good in the eyes of the Bench and the Bar, as well as persons interested in and knowledgeable about the courts.

The interests of the general public in judgeships are the least substantive. Most persons are blissfully unaware of the activities of the courts except in those instances in which there is a scandal in judicial administration or in the life of a judge. There are, however, "attentive publics" who are involved in frequent litigation and, hence, constitute the "clientele" of the courts. This group includes public agencies handling civil or criminal matters, and

established economic institutions, such as banks, insurance companies, public utilities, real estate companies, general business organizations, and labor unions. These organizations have a keen interest in seeing that persons go on the bench who they feel will be favorable to, or at least not antagonistic to, their interests.

Having determined the perspectives that each of the four groups bring to the selection of judges, the study next investigated how influential each of the participants was in the selection process. Of course, each judicial appointment is a distinct occurrence, and a participant that is very influential in one instance may not be influential in another. Nonetheless, it is possible to generalize and to determine the relative influence of each type of participant over time.

The least influential group has been the lay persons on the nominating commissions. They know less about the capabilities of the judicial candidates and tend to defer to the lawyers and even more to the judicial members of the commission on that issue. Lay members are also handicapped by the fact that the interests of the general public whom they are supposed to represent are so amorphous. Those lay persons who come from the business world often do represent the interests of certain of the "attentive publics:" banks, insurance companies, and the like. Also, lay persons appointed by the current governor are frequently a source of information on the political acceptability of the various candidates to the Chief Executive of the State either because the information is transmitted to them directly by the governor or an intermediary, or because they know who the governor's political friends and enemies are without being told.

Lawyer members of the Commission are generally more influential than lay persons simply because they are more knowledgeable about the capabilities of the judicial candidates. However, they sometimes lack information on the political dimensions of the selection process. Also, in many instances, both plaintiffs' and defendants' lawyers are on a commission at the same time and tend to cancel each other's influence. Moreover, lawyer members sometimes defer to the judicial member of the commission, possibly because they are concerned about trying a law suit before him or her.

Most Missouri governors have been fairly influential in the selection process, especially those who want to exercise influence and are skillful in doing so. In the period of our study this influence extended to the nomination phase of the selection process because the lay, lawyer, and presiding judge members of the commissions were sensitive to gubernatorial wishes as to who should be included in the list of three nominees. Apparently, this situation still prevails in some recent appointments. The current governor's first appointment to the Missouri Supreme Court was a thirty-three year-old individual who had served as the governor's deputy when he was Attorney General and later as his Chief of Staff when he became Chief Executive.

Finally, the most influential person in the selection process is the judicial member of the Commission, who serves as its *ex-officio* chair. He or she has a greater stake in the issue of who goes on the bench than do the other

commissioners. This is particularly true when the Chief Justice of the state supreme court is the judicial member of the commission charged with nominating his or her future colleagues on that collegial body. Lay persons are inclined to pay close attention to the judge's views because they believe that the judge knows better than anyone else what a judgeship involves and the qualities that it requires. The judge also has common ties with lawyer members of the commission. Finally, the judge has often been involved in the political world prior to going on the bench and thus appreciates the political dimensions of judicial appointments. In the recent Missouri Supreme Court appointment referred to above, the presiding judge was said to be close to both the governor and the eventual appointee.⁶

Thus the Nonpartisan Court Plan as it has operated in Missouri has reflected in varying degrees the perspectives of the general public, the Bench, the Bar, and the state's chief political figure, the governor. The Plan has not, as some of its supporters claim, taken the politics out of judicial selection. Judges are not brought by storks; persons involved in selecting them maneuver for advantage because such judgeships constitute prestigious positions for ambitious lawyers and because, in the course of making decisions, judges inevitably affect the fortunes of persons and groups involved in the litigation system. Such maneuvering will occur under any selection system. Thus, the issue is not whether the Nonpartisan Court Plan is a perfect one that eliminates politics altogether from judicial selection, but rather how it compares with other selection systems.

Generally, lawyers in Missouri prefer the nonpartisan system over the elected one that it replaced. They also rated Plan judges generally higher than elected judges before whom they also practiced. Of particular interest is the fact that very few Plan judges were rated as being "very poor" by the attorneys who practiced before them. Thus, the Plan does not guarantee that all judges selected will be excellent ones, but the process tends to eliminate highly incompetent ones.

Having made this generally favorable assessment of the Plan, it should be emphasized that the Plan does have some problems that need to be addressed. The presiding judge of the nominating commission, particularly the one proposing candidates for the state supreme court, is in a position to unduly influence who his or her future colleagues will be. While the presiding judge is undoubtedly very knowledgeable about the court and its operation, there is a danger that the judge will attempt to have persons chosen who share his or her views and who will become allies in matters before the court. The Missouri Senate Interim Committee has proposed that the judicial member be a non-voting member of the commission and that an additional lay person be added to the body. My own preference in the case of the

6. That same judge was accused by the then State Chairman of the Republican party of being deeply involved in three appointments to the supreme court in 1982. The Commission on Retirement, Removal, and Discipline that considered the matter absolved the Justice of any wrongdoing, but the Interim Senate Committee that also heard evidence on the matter said that evidence supported the State Chairman's contentions.

state supreme court nominating commission would be to see the Chief Justice removed altogether and the dean of a law school in the state substituted. Such a person presumably would be knowledgeable about the court and the qualities of a good judge, but would not have a direct, personal stake in who goes on the court.

The selection process under the Plan also suffers from a lack of training for nominating commissions and lack of a designated procedure for gathering information on potential candidates, for interviewing them, and for voting on the final list of three nominees that is sent to the governor. The present unstructured situation particularly disadvantages lay members on the nominating commissions, but all parties concerned would benefit from making the entire process more systematic and open. Both the Missouri Senate Interim Committee and the Missouri Bar Association Committee mentioned above agree on the advisability of these changes.

Finally, the method whereby the electorate votes "yes" or "no" on whether a judge should be retained in office has not been effective. In the forty-six-year history of the Plan, only one judge has been voted out of office; that occurred in 1942 and involved unusual circumstances.⁷ It is possible, of course, to conclude that none of the judges deserved to be removed. That seems highly unlikely, however, particularly since a number of judges voted on under Plan procedures were originally chosen under partisan elections involving machine politics and were held over when the Plan went into effect. Rather, an analysis of voting patterns over the years indicates that a relatively small proportion of the electorate votes on judicial retention, and those people who do vote do not discriminate to any significant degree among the judges who are up for reelection.

Unfortunately, the members of the Bar have not met their responsibilities in assisting voters in making informed judgments in such elections. Although the Missouri Bar Association has conducted a Bar poll prior to retention votes since 1948, none has ever recommended that a judge not be retained in office.⁸ Moreover, a Commission on Retirement, Removal and Discipline was established in 1972 in order to monitor performance of all judges in Missouri, but to date no judge appointed under Plan procedures has been removed from office as a result of actions of the Commission.

It is difficult to determine what, if anything, should be done about the retention procedure for Plan judges. Perhaps we should just face the fact that in reality, like federal judges, Plan judges enjoy what amounts to life tenure and let it go at that. The Missouri Senate Interim Committee, however, made a series of recommendations on the matter, including: (1) raising

7. The judge was closely associated with the Pendergast political machine and had incurred the enmity of both the *Kansas City Star* and the Kansas City Public Service Company. Moreover, a citizen's group was formed to bring about his defeat. Despite all those handicaps, he still was barely defeated, receiving a 46 percent affirmative vote.

8. Lawyers whom we questioned on the matter gave various reasons for that development, such as the fear that the ballots are not really secret or that it is considered "dirty pool" to turn a judge out of office and force him to build up a clientele again after most of his clients have taken their business elsewhere.

the necessary retention affirmance vote from fifty to sixty percent; (2) adding three lay persons to the Commission on Retirement, Removal and Discipline; and (3) in the case of a Commission investigation of a Supreme Court justice, having disciplinary recommendations forwarded to the Missouri House of Representatives for impeachment hearings rather than having such recommendations go to the Court itself, as is presently the case.

It is unlikely that raising the necessary affirmance vote from fifty to sixty percent will have much effect, since most judges draw about eighty percent of the vote. It is also unlikely that adding lay persons to the Commission on Retirement, Removal and Discipline will make a difference in the activities of that body. Furthermore, the recommendation of the Interim Committee regarding disciplinary actions against supreme court judges involves only a small number of the state's judges. Perhaps urging a more assertive role for the Commission as it is presently constituted is the best recommendation that one can make on the retention issue.⁹

9. As presently constituted, the six-person commission consists of two judges chosen by judges, two lawyers appointed by the governing body of the Missouri Bar, and two lay persons selected by the Governor.

