

Report of Missouri Bar Commission on the Impartiality of the Judiciary

President Joe Whisler charged our commission, appointed by him upon authority of the Action of the Board of Governors to:

1. Identify appropriate involvement of The Missouri Bar in defending the judiciary and/or the individual judge who, from time to time, may be subject to unfair or inaccurate criticism.
2. Determine means by which to defend The Missouri Non-Partisan Court Plan.

The commission has addressed each of the two charges and submits to the Board of Governors three reports, which are attached. Each can stand alone.

The Plan for Response to Criticism of Judges and Courts addresses when action in response to criticism should be taken, provides guidelines to assist the bar in determining when the Bar should respond, and offers suggestions for the timing, form, and drafting of the response, should a response be deemed necessary.

Target Audiences and Current Materials on the Missouri Non-Partisan Court Plan and Suggestions for the Future delineates current materials and activities provided by or sponsored by The Missouri Bar on the Missouri Non-Partisan Court Plan, recommends audiences to target for education on the plan and means by which to reach those audiences, and recommends additional means of providing information and education regarding the Plan. The commission presents this as a practical guide intended to be thought-provoking and to be supplemented and updated as time passes.

Finally, the document entitled “Effectiveness of the Missouri Non-Partisan Court Plan” includes a brief history of the plan and contains substantive, positive information about the benefits of the plan. The report contains three appendices: The History of Judicial Selection (Appendix 1); Responses to Politicizing the Judiciary (Appendix 2); and, Bibliography for “Effectiveness of the Missouri Non-Partisan Court Plan” (Appendix 3). The commission envisions that these documents will be useful educational tools.

The commission operated effectively with three subcommittees:

A. Subcommittee to Develop Standards for Response to Unfair/Inaccurate Criticism:

Doreen D. Dodson, Chair
John Fox Arnold
Stephen B. Higgins
Ronald E. Mitchell
Kenneth H. Suelthaus
Harold L. Whitefield

B. Subcommittee to Identify Ways to Further Educate the Bar and the Public About the Missouri Plan:

Susan Ford Robertson, Chair
Judge Joseph M. Ellis
Cindy Reams Martin
John B. Morthland
William Edward Reeves

C. Subcommittee to Evaluate the Effectiveness of the Missouri Plan:

Jack L. Campbell, Chair
Jerome E. Brant
Robert M. Clayton, III
Fred L. Hall, Jr.

The commission has appreciated the opportunity to participate in this project. We stand ready to discuss our submission and to respond to any questions.

Respectfully submitted,

R. Lawrence Ward

Ann K. Covington

THE MISSOURI BAR PLAN FOR RESPONSE TO CRITICISM OF JUDGES AND COURTS

INTRODUCTION

WHEN ACTION IN RESPONSE TO CRITICISM SHOULD BE TAKEN BY THE MISSOURI BAR

To avoid infringing on the freedom of expression, this plan is designed to effect a response on behalf of the judiciary and courts to criticism that is serious as well as inaccurate or unjustified.

There should be no attempt to prevent criticism of the merits of the matter at issue, but inaccurate or unjust criticism should be answered through an organized public information program. Such criticism typically results from a lack of understanding of the system – the reason for a decision, a sentence or a courtroom action.

A. GUIDELINES TO DETERMINE WHEN THE BAR SHOULD RESPOND

1. The following are the kinds of cases in which responding to criticism is appropriate, except in unusual circumstances:

When the criticism is serious and will most likely have more than a passing or *de minimis* negative effect in the community; and

- (a) the criticism displays a lack of understanding of the legal system or the role of the judge and is based at least partially on such misunderstanding; or
 - (b) the criticism is materially inaccurate and the inaccuracy is a substantial part of the criticism so that any response does not appear to deal with inconsequential issues.
2. The following factors should be (i) considered in determining whether a response should be made in a close case and (ii) considered in every case in determining the type of response:
 - (a) Whether a response would serve a public information purpose and not appear to deal with inconsequential issues;
 - (b) Whether the criticism will be met adequately by a response from some other appropriate source;
 - (c) Whether the criticism substantially and negatively affects the judiciary or other parts of the legal system;
 - (d) Whether continuing discussion of the criticism would serve to lower public perceptions as to the dignity of the court, the judiciary or the judicial system, perpetuate the criticism or draw unnecessary attention to it;
 - (e) Whether the criticism is directed at a particular judge but unjustly reflects on the judiciary generally, the court, or another element of the judicial system (e.g., grand jury, lawyers, probation, or bail);
 - (f) Whether a response provides the opportunity to inform the public about an important aspect of the administration of justice or address a misunderstanding (e.g., sentencing, bail, evidence rules, due process, fundamental rights, or the role of the judiciary);

- (g) Whether the criticism, although generally accurate, does not contain all or enough of the facts to be fair;
 - (h) Whether the timing of the response is especially important and can best be met by the Bar.
3. The following are the kinds of cases in which response to criticism IS NOT appropriate, except in unusual circumstances:
- (a) When a controversy exists between the critic and the judge on a personal level;
 - (b) When the criticism is vague;
 - (c) When criticism raises issues of judicial ethics which are more appropriate for presentation to the Commission on Retirement, Retention and Removal of Judges;
 - (d) When an extended investigation to develop the true facts is necessary;
 - (e) When the response may prejudice a matter at issue in a pending proceeding;
 - (f) When the impact of the criticisms is insignificant;
 - (g) When the Bar's response may be construed as an endorsement for the election or appointment of a particular candidate;
 - (h) When the response would defend the indefensible.

B. THE RESPONSE

1. Timing.

To be effective, the response must be prompt and accurate.

2. Form of Response.

The form and manner of the response should be such that it will receive prompt appropriate exposure commensurate with the criticism.

3. Drafting Considerations.

- (a) The response should be a concise, accurate, "to the point" statement, devoid of emotional, inflammatory or subjective language;
- (b) The statement should be informative and not argumentative or condescending;
- (c) The statement should include a correction of the inaccuracies, citing facts and relevant authorities where appropriate;
- (d) The statement should be written in lay terms;
- (e) Where appropriate, the statement should include the point that the judge had no control or discretion (e.g., decision required by state law);
- (f) Where appropriate, the statement should include an explanation of the process involved (e.g., sentencing, bail, or temporary restraining order);
- (g) The statement should not attempt to discredit the critic, or attack the competence, good faith, motives or associates of the critic;
- (h) The statement should not provide evidence that the critic has hit a nerve, causing overreaction;
- (i) The response should not appear defensive or self-serving.

4. Content of the Response.
 - (a) Identify the criticism and its source, keeping in mind that reporting the criticism may not always accomplish the overall objectives of the response.
 - (b) Address the criticism or the general subject of the criticism and avoid taking positions on the underlying controversy.

The following points may be included in a typical response:

- (a) Lawyers, under the Missouri Rules of Professional Responsibility, have a duty to defend judges against unjust criticism. See Comment to Rule 4-8.2.
 - (b) We may frequently disagree with the decisions and actions of public officials, including judges. The federal and state constitutions protect our right to express that disagreement.
 - (c) We must remember that judges have no control over the cases which come before them, but they must decide each and all of those cases. Judges must follow the law as established by higher courts. One side always loses in every lawsuit.
 - (d) Because of their position, judges are not wholly free to defend themselves and it is ordinarily not appropriate for them to personally answer charges made against them or their decisions.
 - (e) The need for impartial judges, who will not be influenced by criticism of them or their decisions, requires that the Bar remind both lawyers and the public of these facts.
 - (f) The law has established appellate courts so that decisions of judges may be reviewed. Our present legal system provides for change in the law through legislative action and by constitutional revision.
5. Responsibility for Response.
 - (a) All referrals of criticism of judges or courts or the Non-Partisan Court Plan shall be forwarded to the President or Executive Director of The Missouri Bar.
 - (b) The President, and the Executive Committee if practical under the circumstances, using the guidelines in this Plan, shall (i) determine whether a response is appropriate and, if so, (ii) determine the content of the response.
 - (c) The President shall make the response and is the only person authorized to do so unless the President designates another person or persons to respond.

Target Audiences and Current Materials on the Missouri Non-Partisan Court Plan and Suggestions for the Future

Target Audiences for Education on the Missouri Non-Partisan Court Plan

1. Missouri attorneys
2. Missouri legislators
3. Students in Missouri's four law schools
4. Faculty in Missouri's four law schools
5. Faculty at the other universities and colleges in Missouri
6. Students in the other universities and colleges in Missouri
7. Faculty in the high schools, junior high schools, and elementary schools in Missouri (public and private)
8. Students in the high schools, junior high schools and elementary schools in Missouri (public and private)
9. Civic organizations and business groups, such as Chambers of Commerce, Missouri Farm Bureau, Rotary, League of Women Voters, etc. at the state, county and local levels
10. Churches and church organizations
11. Issue groups such as environmental groups, business groups, product liability advisory council
12. Political organizations at the state, county and local levels
13. The general public
14. Media and media groups
15. Judges
16. Local bar associations
17. Other lawyer groups, such as the Association of Corporate Counsel

Suggested Ways to Reach Target Audiences

1. Print media, especially in rural areas, including press releases, letters to the editor from local attorneys, as well as from The Missouri Bar president
2. Commit a standing part of The Missouri Bar website to providing a centralized, current, convenient place for quick and accurate access to information regarding the Missouri Non-Partisan Court Plan
3. Develop a separate website dedicated to resources regarding judicial impartiality with links provided to The Missouri Bar website—this separate website would also provide a centralized, current and convenient place for quick and accurate access to information regarding judicial impartiality and the Missouri Non-Partisan Court Plan
4. Television
5. Radio
6. Printed materials
7. Videotapes
8. Direct mail
9. Speakers, including retired judges
10. Forums, seminars, and meetings
11. Word of mouth
12. Email

Current materials provided by The Missouri Bar on the Missouri Non-Partisan CourPlan

1. TV commercials addressing the significance of the Missouri Non-Partisan Court Plan. These commercials are played throughout Missouri.
2. Radio commercials addressing the significance of the Missouri Non-Partisan Court Plan. These commercials are played throughout Missouri.
3. A brochure called “Speak up for Missouri Courts.” These are new and free for lawyers to put in their waiting rooms. The Bar is

considering providing brochures for the courts in St. Louis and Kansas City, after obtaining lawyer response.

4. A videotape of Prof. Rick Hardy's lecture on the history and value of the Missouri Non-Partisan Court Plan, along with a print version of his comments.
5. A videotape of Sen. Joe Moseley explaining how to lobby effectively at the state and community level.
6. A videotape on judicial independence for high school students. Copies of the video were sent 4 years ago to all high school social studies departments. The videotape has also been playing on cable access channels throughout Missouri.
7. The bar's evaluations of the judges standing for retention under the plan are available to the public.
8. Radio announcements about the availability of the evaluations.
9. The Missouri Bar Bulletin.

Other avenues of providing information about the plan include:

1. Dialogue, a twice-a-year newsletter from the Board of Governors to Missouri lawyers.
2. ESQ—the weekly newsletter to all lawyers who have provided the bar with email addresses (85%).
3. Bar presidents' speeches.
4. *Access*, a quarterly newsletter to the public, about law and legal matters.
5. Letters by the bar to the 88 local and specialty bar presidents.
6. Bar officers' participation in media tours, meeting with reporters in ten cities to acquaint them with background information on issues.
7. The Communications Department of the bar publishes "Briefly," a monthly newsletter to the media that provides background information on issues important to the bar.
8. Bar meetings—spring and summer, annual, and the solo and small firm conference.
9. The bar's law-related education director, Millie Aulbur, includes judicial independence as a topic for lessons and programs. This year the fall symposium for social studies teachers will focus on judicial independence.

10. Law School for Legislators.
11. Officer and staff lobbying at the state and federal levels.
12. The Missouri Bar Journal.

Recommendations for Future Education and for Dissemination of Information

1. A portion of The Missouri Bar website could be devoted to providing a centralized, current, convenient place for quick and accurate access to information regarding the Missouri Non-Partisan Court Plan. Speakers and those in the targeted audiences could readily access the information and links could easily be inserted in emails.
2. A separate website could be developed and managed by The Missouri Bar, devoted to the issues surrounding judicial independence and the Missouri Non-Partisan Court Plan. This website would also provide a centralized, current, convenient place for quick and accurate access to information regarding the plan. Speakers and those in the targeted audiences could readily access the information and links could easily be inserted in emails. Consideration of a blog should be explored in connection with this separate website.
3. The bar should continue all activities that address education regarding the Missouri Non-Partisan Court Plan.
4. The bar should ensure that all available information regarding the Missouri Non-Partisan Court Plan is disseminated frequently and consistently.
5. Involve non-lawyer groups in the education and information process regarding the Missouri Non-Partisan Court Plan. This avoids the appearance that just lawyers are talking about lawyers.

6. Form a standing committee on judicial impartiality charged to compile, organize and track the materials available to provide education and information about the Missouri Non-Partisan Court Plan. The committee would keep current a list of target audiences and coordinate dissemination of available materials. The committee could explore whether additional methods could and should be utilized, including, for example, a national symposium on threats to the non-partisan court plans/merit appointments/judicial independence among the state court systems, or essay contests in the school to promote awareness of the need for judicial independence.
7. Emphasis should be placed upon email and word of mouth dissemination of information, in addition to the other available and utilized methods.
8. A recurring message might be: "Do you want to have your case heard by a judge to whom the opposing party's lawyer gave a lot of money for re-election?"

EFFECTIVENESS OF THE MISSOURI NON-PARTISAN COURT PLAN¹

Thirty-four states employ some form of non-partisan selection of judges, including tenure independent of politics, and retention elections for public accountability.

Under the Missouri Non-Partisan Court Plan, a non-partisan commission of lawyers and lay persons recruits and evaluates applicants for judgeships and submits the names of qualified applicants to the governor for appointment. Judges appointed by the governor are evaluated for retention by the voters in uncontested elections at the next general election following 12 months in office and at 12-year intervals thereafter.

The Missouri Non-Partisan Court Plan is not a system that grants lifetime judgeships, like the federal system. While non-partisan selection does not ensure total elimination of politics from judicial selection, it does minimize political influence by eliminating the need for judicial candidates to solicit campaign contributions, circulate campaign advertising, and make campaign promises, each of which comprises judicial integrity and public confidence in the judicial system.

In 1821, when Missouri entered the Union, all judges were appointed for life by the governor with advice and consent of the state senate. After much public discussion, voters amended the Missouri Constitution in 1850 to provide for popular election of judges. The Supreme Court and circuit court judges were elected to six-year terms. In 1872, the terms of Supreme Court judges were extended to 12 years.

¹ The subcommittee would like to express its appreciation to the American Judicature Society and Rachel Paine Caufield, Ph.D., assistant professor of the Department of Politics and International Relations at Drake University, program consultant for the Elmo B. Hunter Center for Judicial Selection at the American Judicature Society.

Between 1875 and 1909, Missouri added its Courts of Appeals. The constitutional amendments creating the Courts of Appeals provided that judges should be elected by the people to 12-year terms.

The Missouri Non-Partisan Court Plan initially called for judges of the Supreme Court, Courts of Appeals, and circuit and probate courts in the City of St. Louis and in Jackson County to be appointed by the governor from a list of three persons submitted by the judicial nominating commission. Judges would stand for retention on a non-partisan ballot in the first general election after 12 months in office and if retained at 12-year intervals¹ thereafter.

Prior to the adoption of the Missouri Non-Partisan Court Plan, judicial selection in Missouri was controlled by political machines and party bosses in the urban areas which regularly unseated those judges who had issued rulings unfavorable to the interests of the machine and party bosses (e.g., under machine politics, from 1918 to 1941, only two Supreme Court justices were successful in bids for re-election).

After the Missouri Non-Partisan Court Plan was adopted in 1940 as a constitutional amendment by initiative petition, opponents persuaded the 1941 legislature to submit its repeal to the voters. Support for the Non-Partisan Court Plan was even greater in the election of 1942. In 1994 and after a challenge to the Non-Partisan Court Plan, the Missouri Constitutional Convention retained it. An effort was made to abolish the Missouri Non-Partisan Court Plan in 1955 when a measure offered in the legislature was rejected by a two-to-one vote in the House and was never considered in the Senate.

In most of Missouri, voters still elect circuit judges in partisan elections. In 1970, voters extended the non-partisan plan to circuit and probate judges in St. Louis County. Three years later, voters extended the Missouri Non-Partisan Court Plan to circuit and probate court judges in Clay and Platte counties. These changes were reflected by the Missouri

Constitution as amended in 1976. (The Kansas City Charter extended the non-partisan plan to Kansas City Municipal Court judges as well.) Under the Constitution, other judicial circuits may adopt the plan upon approval by a majority of the voters in the circuit.

In 1988, 1991, 2004 and 2005, proposals were introduced in the legislature to abolish the Missouri Non-Partisan Court Plan.

A measure introduced in the legislature in 1989 would have prohibited the governor from communicating directly or indirectly with members of the nominating commission until the nominees for a judicial vacancy were submitted to the governor. Between 1990 and 1993, measures were introduced that would alter the selection process for the non-lawyer members of nominating commissions; require senate approval of gubernatorial appointments; impose 12-year term limits on elected and appointed judges; increase the affirmative percentage required for retention to 60 percent; and allow voters to petition for a special retention election for judges in their area.

In 2005, a proposal was introduced to require confirmation of judges appointed under the Missouri Non-Partisan Court Plan by the state senate.

Because the Missouri Non-Partisan Court Plan has been an effective method of selecting appellate judges in the state and the trial court judges in major population centers, none of these bills were adopted by the legislature.²

CONCLUSIONS OF THE SUBCOMMITTEE

A. Impartiality: Securing a Neutral Court Free from Partiality, Partisanship and Bias

1. The “Founding Fathers” of our Republic enshrined in the Constitution only the appointive system in selection of judges.
2. Political contributions by attorneys or parties in interest who appear before the elected judge:

² Appendix 1: History of Merit Selection

- a. Undermine public confidence in the elected system and the impartiality of the courts; and
 - b. Place financial pressures on the attorneys and parties who come before the judge.
3. The Missouri Non-Partisan Court Plan must be protected and retained, if not improved, because money and special interest pressures are on the increase in the past 5 to 10 years.
 4. One study shows in states utilizing the elective process that tort awards against out-of-state corporations are \$200,000 to \$400,000 higher than states that have adopted the Missouri Non-Partisan Court plan; thus, electing judges can create a negative business climate.
 5. A substantial majority of the states (34) have adopted some form of the Missouri Non-Partisan Court Plan and continue its use today, which strongly suggests that the plan has passed the test of close scrutiny and has been deemed superior to the elective process. Those states which have retained statewide election of judges, such as Illinois and Texas, provide excellent examples of the encroachment of money and special interests into the selection process.
 6. Judicial candidates are spared the potentially compromising process of party-slating, raising money, and campaigning.
 7. Judges chosen through merit selection do not find themselves trying cases brought by attorneys who gave them campaign contributions.
 8. Because most candidates cannot afford to personally finance their election campaigns, they have to raise the money they need. Much of this money comes from attorneys and some of them will be appearing in front of those judges. The relationship can raise questions about the judge's impartiality.
 9. Retention elections were introduced as a compromise between those who wanted to insulate the judiciary from political pressures and those who wanted the judiciary to remain responsive to public concern.
 10. As shown in the 2000 judicial elections, in states such as Alabama, Michigan and Ohio, and has since been shown in Illinois and Texas, campaigning for office can transform judicial candidates into ordinary politicians giving sound bytes and raising campaign funds. Judicial elections tend to politicize the judiciary in the eyes of the public.
 11. There is now evidence supporting the assertion that judicial elections jeopardize public trust and confidence in the courts. An overwhelming percentage of respondents to surveys believe that campaign contributions made to judges have some influence on their decisions, and more than two-thirds felt that individuals or groups who give money to judicial candidates often get favorable treatment.

12. To foster the appearance of an independent and impartial judiciary, a system must be in place that emphasizes judicial qualifications, opens the process to all who meet the legal requirements, and eliminates the need for political campaigning. Merit selection is such a system.³

B. Quality Selection: Attracting and Retaining the Bench's Best and Brightest

1. Selection and screening by merit, rather than by the traditional political process, has enhanced public perception of the Missouri Non-Partisan Court Plan.
2. The Missouri Non-Partisan Court Plan increases probability that:
 - a. The unqualified are eliminated; and
 - b. The qualified are selected for appointment.
3. The Missouri Non-Partisan Court Plan may be preferable to highly qualified candidates. The highly qualified candidate may have less interest or knowledge of a process that may require political pandering or appeals for money. The plan also provides some degree of stability to attract the highly qualified candidates.
4. The Missouri Non-Partisan Court Plan secures a representation of women and minorities on the bench as well, or better than, the elective system.
5. Voter polls have revealed that the electorate has little knowledge or interest in judicial elections and the public lacks the tools to effectively assess judicial qualifications by review of legal careers, legal education or the quality of judicial opinions.
6. Experience has shown that less than 1% of judges standing for retention have been rejected, which may suggest that merit-selected judges are less controversial and more scholarly. The retention rate does not reflect the number of judges removed or retired due to other disciplinary means.
7. To the contrary, in Missouri, our experience with elective judges prior to the plan (1918 to 1941) saw only two Supreme Court judges re-elected, which strongly suggests that political influences and not judicial qualifications controlled the composition of the Missouri Supreme Court.
8. The Missouri Non-Partisan Court Plan supports and encourages merit selection, but does not completely eliminate political influences.
9. That voters know little about the candidates in judicial contests has been empirically verified.

³ Appendix 2: Response to Politicizing the Judiciary

10. Because judges would be chosen initially on the basis of professional merit, those supporting merit selection anticipated very few removals by the electorate and only in egregious cases.
11. Nominating commissions do claim to emphasize the mental and professional health of applicants, along with their professional reputations, as the most important criteria in making nominations.

C. Accountability: Holding the Judiciary to Account

1. The Missouri Non-Partisan Court Plan affords accountability via retention elections and by use of the Commission on Retirement, Removal and Discipline of Judges.
2. Accountability is not achieved when few voters exercise their franchise. Consistently low voter turnout for judicial elections does not ensure accountability.
3. Judicial retention elections were intended to introduce an element of accountability to judicial appointment systems.
4. While studies of retention elections have show an incredibly low percentage of judges not retained, a very high percentage of those not retained were for what *all* persons considered significant reasons.
5. The most common reason that a judge is not retained is that they lacked professional competence.
6. A substantial number of judges not retained were opposed for more than one reason.
7. Failed bids for retention almost always have a united front against retention by the organized bar, the public, and the press.
8. A majority of those not retained were the subjects of public campaigns to remove them from office.
9. The general conclusion is that retention elections are a useful tool for holding judges accountable, especially in urban areas where the bar, the press and citizen groups can make the public aware of those judges they believe to be unqualified for office.
10. The majority of judges believe that the most effective thing judges can do to win a retention election is competent judicial performance.
11. While judges do not necessarily believe that bar evaluations accurately measure their on-the-bench performance, there is general concurrence that state-sponsored evaluation programs are a valuable means of enabling voters to make informed choices.
12. There is evidence that judicial evaluation programs are effective in informing and influencing voters.

CONCLUSION

The function of a judge (within our constitutional framework) is not to represent current views, but rather to apply current law. Response to current views is the responsibility of the executive and legislative branches. At times it may even be necessary, if the judges are properly to perform their duties, to declare against the common view, often against legislative inaction and against executive action. Judges should be impartial in their decision-making.

Appointment of judges is more indigenous to America than their election. An appointive judiciary was the only one seriously considered by the “Founding Fathers.” The Missouri Non-Partisan Court Plan will encourage well-qualified persons to serve on the bench who would not submit themselves to the ordeal of campaigning for office under the former political system or who lacked the means to finance such campaigns. The fact of the matter is, judicial salaries have not begun to keep up with what experienced and dedicated lawyers receive in the open market. The problem of individual lawyers not willing to subject themselves to the potential indignities, sometimes false accusations and the financial strain of elections are further compounded by the fact that many of our excellent lawyers who have the qualifications to be excellent members of the judiciary would have to take substantial reductions in pay to participate in the process that holds the potential to be sometimes demeaning.

Those who attack the Missouri Non-Partisan Court Plan should acknowledge there is a difference from the beginning of our nation, in the judiciary and political branches of government. This was intended by our Founding Fathers. Judges are supposed to be impartial; governors and legislators are not.

Governors and legislatures are supposed to represent the views of their constituents; judges are not.

Judges are subject to ethical restrictions that limit their ability to clarify their positions or comment on their decisions; governors and legislators are not.⁴

Submitted by the Subcommittee to Evaluate the Effectiveness of the Missouri Non-Partisan Court Plan

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⁴ Appendix 3: Bibliography

APPENDIX 1 HISTORY OF MERIT SELECTION

In 1821, when Missouri first entered the Union, all judges were appointed for life by the governor with senate consent. After much public discussion, voters amended the Missouri Constitution in 1850 to provide for popular election of judges. The Supreme Court and circuit court judges were elected by the people to a six year term. In 1872, the terms of Supreme Court judges were extended to twelve years.

Between 1875 and 1909, Missouri added its three courts of appeals. In all cases, the constitutional amendment creating the courts of appeals all provided the judges should be elected by the people to twelve year terms.

Nationally, the elective judiciary had its start in the 1830s. Mississippi, in 1832, was the first state to elect all judges. New York followed Mississippi in 1846. Within ten years, 15 of the 29 states existing in 1846 had, by Constitutional Amendment, provided for the popular election of judges, and of the states which have entered the Union since 1846, every one has provided that most or all judges shall be popularly elected for terms of years.

However, by the close of the 19th century, disenchantment had begun to set in with the election of judges. In the first decade of the 20th century, there appeared to be a growing awareness of the judicial selection problem and some groping for answers.

One of the most widely quoted sentences in all of judicial selection for over a century was found in Roscoe Pound's 1906 address on "The Causes of Popular Dissatisfaction with the Administration of Justice." That sentence, "Putting courts into politics and compelling judges to become politicians in many jurisdictions has almost destroyed the traditional respect for the bench." Judges from the Supreme Court to the circuit level in states that have not adopted some form of merit selection believe this statement is still true 99 years after it was first stated by Roscoe Pound.

In 1913, William Howard Taft, then a former president and future chief justice of the United States, addressed the subject of selection of judges at the American Bar Association convention. He severely criticized both partisan and non-partisan elections and urged a return to the appointed system.

The retention election, based upon historical information available, was the idea of Albert M. Kales. Kales offered the following suggestion:

The appointment might be for a probationary period—say three years—at the end of which time the judge must submit at a popular election to a vote on the question as to whether the place which he holds shall be declared vacant. This is not a vote which puts anyone else in the judge's place, but a vote which can, at most, only leave the place to be filled by the appointing power. Such a plan must necessarily promote the security of the judge's tenure if at the popular election his office be not declared vacant. After surviving such a probationary period, his appointment should continue for—let us say—six or nine years. At the end of that place the question might again be submitted as to whether his place should be declared vacant.

This statement by Kales constitutes a very clear enunciation of the principle of tenure by non-competitive election. No hint of such a device had ever been found in any prior writings. This device today remains a feature of the merit plan in substantially the same form today as it was when it was first proposed by Kales. The basic principles of the three features of merit selection and tenure—nomination, appointment and elective tenure—were first proposed by Kales in 1914.

In 1926, Harold J. Laski, an American lawyer who made a name for himself in the English legal world in a scholarly article prepared for the Michigan Law Review, for the first time, proposed gubernatorial appointment with the aid of an advisory committee consisting of a judge of the Supreme Court, the attorney general, and the president of the state bar association. Here, for the first time, a lawyer as well as judges was proposed for participating in the nominating function.

From 1928 forward, when Herbert Harley, founder of the American Judicature Society, proposed that a governor, not the chief justice, should be the appointing authority, little or nothing is heard about appointment by an elected chief justice and more and more is heard

about bar participation in both judicial appointments and judiciary elections. This idea reached its zenith in the early 1960s by the American Bar Association through its committee on the federal judiciary which screens candidates and advises the United States Justice Department in regard to federal judicial appointment.

The year 1931 marked an important development in the evolution of the merit plan, for it is then that we find the first suggestion of the final element in the present day nominating commission—the lay citizen member. The occasion was an editorial discussion of a proposal in *The Panel*, a publication of the Grand Jury Association in New York, for a non-partisan commission to make recommendations for judicial elections in New York.

The decade of the 1930s witnessed a rapid increase in professional discussion of judicial selection problems, and new ideas came thick and fast. In Georgia and Utah, there appeared proposals for appointment by the governor from lists of nominees submitted by the bar. At the 1933 American Bar Association convention in Grand Rapids, Michigan, the Conference of Bar Association Delegates, forerunner of today's ABA House of Delegates, conducted a symposium on judicial selection at which numerous proposals were advanced and discussed, most of them calling for some form of bar association participation or lawyer-laymen nominating commissions, with appointment by the governor.

California came close to being the first state to bring merit selection from fantasy to fact in 1933. The proposal was defeated at the polls in 1934.

In 1937, the ABA House of Delegates formally endorsed adoption of the merit plan as an association objective. In 1940, Missouri became the first state actually to put a nominative-appointive-elective plan into operation and make the "Missouri Plan" along with "Kales Plan," one of the synonyms for merit selection and tenure.

Prior to the adoption of the Missouri Non-Partisan Court Plan, judicial selection in Missouri was controlled by political machines and party bosses who sought to unseat judges

who issued unfavorable rulings. Judicial positions were so tenuous under machine politics that from 1918 to 1941 only two Supreme Court justices were successful in their bids for re-election.

In Missouri, the measure was placed on the ballot through an initiative petition. The plan called for judges of the Supreme Court, courts of appeals, and circuit and probate courts in the City of St. Louis and in Jackson County (Kansas City) to be nominated by the governor from a list of three persons submitted by the judicial nominating commission. Judges would stand for retention in the first general election after 12 months in office. While the judicial article has been amended, the Missouri Non-Partisan Court Plan was left intact.

It is difficult to determine the precise reasons why Missouri became the first state to adopt the Missouri Non-Partisan Court Plan favored by the American Judicature Society and American Bar Association, but certain factors contributed greatly to a successful campaign. One was the general political climate of the times. The Pendergast and Shannon faction of the Jackson County Democratic party fought a bitter intraparty battle in the state Supreme Court primary contest in 1936 and, two years later, they joined forces in an unsuccessful effort to unseat an able and popular incumbent Supreme Court justice who was reputed not to have voted Pendergast's way in certain litigation before the Court. The blatant injection of party factional fights into the selection of judges for the highest court in the state alarmed many lawyers and many prominent citizens in Missouri. On the other side of the state, ward leaders succeeded in getting a person elected to the St. Louis Circuit Court who had never really practiced law but had served as a pharmacist in a St. Louis hospital in the years preceding his election to the circuit bench. Despite the fact that he rated at the bottom of the list in the bar poll in 1934, he was elected to the circuit court. His subsequent service on the court

during the next six years was severely criticized by the St. Louis press. This is the famous Judge Padberg story.

Although Judge Padberg was admitted to the bar in 1927, up to the time of his election he had made his living as a pharmacist in a St. Louis hospital. During the eight years between his admission to the bar and the time of his taking office as a circuit judge, he had been the filing attorney in eight divorce cases and in one annulment case. In 1934, he was entered in the Democratic primary by a friendly Democratic committeeman. In the St. Louis bar association poll, he received only 42 votes, running 19th out of 21, while the top man received 527 votes. Since only nine judges were to be nominated, he failed to secure endorsement. But in the primary, he was one of the nine successful candidates, receiving the third highest number of votes. Then in the bar association's pre-election referendum, he was low man among the 18 candidates. In the general election he won – it was a Democratic year.

What kind of judge did he make? The *St. Louis Post-Dispatch* contended, "Padberg's six years on the bench have been a humiliation to the law and to the city." He was in charge of a grand jury whose task was to investigate flagrant election frauds. As foreman of this jury, there was an "old-time politician who had a flock of relatives on the city payroll; among its other members were three with political connections." This grand jury not only failed to return indictments, but it declined to go through the motions of investigating the election frauds. Judge McAfee, a fellow judge, summarily discharged this grand jury, unprecedented in St. Louis. His conduct in the S. N. Long Warehouse Co. case caused two other judges to reverse, in effect, his decision.

In 1940, Padberg failed to secure re-nomination when he lost in the Democratic primary. He ran 10th in a field of 21 – again he ran much better than the St. Louis bar

association referenda taken before the primary would indicate. After this defeat, there was a move by certain members of the Democratic Central Committee to have him placed on the ballot to run for a vacancy created by the death of Circuit Judge Rowe. This move was vociferously opposed by the press, and created much antagonism toward the then present method of election, just at a time when the merit selection question was before the people.

Thus the public in Missouri was exposed in the late 1930s to unfavorable stories about the selection of judicial candidates in the state, and this undoubtedly helped to pave the way for a reform campaign that followed.

On the positive side, the campaign for the adoption of the Missouri Non-Partisan Court Plan in Missouri was well-organized and executed. The leadership of the Bar Association of St. Louis first developed a concrete plan for judicial selection, the Missouri Bar Association and the newly-formed Lawyer's Association of Kansas City worked closely with the St. Louis group in refining its provisions, and in building support for it among lawyers in the state.

After the Missouri Non-Partisan Court Plan was adopted in 1940 as a Constitutional Amendment by initiative petition, opponents said the voters did not understand it and persuaded the 1941 legislature to submit its repeal. The plan received twice the majority in the second election in 1942 than it did in the first election in 1940. Thereafter in 1944, Missouri had a Constitutional Convention which submitted an entirely new constitution. While an effort was made to persuade the Convention to leave out the Missouri Non-Partisan Court Plan, the convention kept it and the new constitution containing it was adopted by an overwhelmingly favorable vote. No further effort was made against the plan until 1955 when a repeal measure was offered to the legislature. It was voted down by a two to one vote in the House and was never considered in the Senate.

In most areas of Missouri, voters still elect judges in partisan elections. In 1970, voters extended the Missouri Non-Partisan Court Plan to judges in St. Louis County. Three years later, voters extended the non-partisan court plan to judges in Clay and Platte counties. These changes are reflected by the Missouri Constitution as amended in 1976. The Kansas City Charter extended the non-partisan selection plan to Kansas City Municipal Court judges as well. Under the constitution, other judicial circuits may adopt the plan upon approval by a majority of the voters in the circuit.

The Missouri Non-Partisan Court Plan came under fire again in the early 1980s. In 1982, a Supreme Court justice was accused by his colleagues of manipulating the selection process to “hand pick” the justices who would fill three vacancies on the Court. In 1985, the Governor appointed his 33-year-old chief of staff, who had no judicial experience, to a vacancy on the Supreme Court. These events led to annual efforts by the Missouri General Assembly to modify or replace the non-partisan court plan. Not surprisingly, some bills were directed at the ethics of the nominating commission and the governor in judicial appointments. A bill introduced in 1989 would have prohibited the governor from communicating directly or indirectly with members of the nominating commission until the nominees for a judicial vacancy were submitted to the governor. In both 1988 and 1991, proposals were made to abolish the non-partisan court plan. Between 1990 and 1993, measures were introduced that would alter the selection process for the non-lawyer members of nominating commissions; require senate approval of gubernatorial appointments; impose 12-year term limits on all judges; increase the affirmative percentage required for retention to 60 percent; and allow voters to petition for a special retention election for judges in their area. None of these bills were enacted.

In the Missouri statewide election of 1990, the average affirmative percentage for judicial retention candidates dropped to 59 percent. Affirmative retention percentages had

been declining slowly but steadily since 1976, when the average affirmative vote was 83 percent.

Worried that a persistence in this trend would result in the removal of qualified judges and would discourage qualified candidates from seeking judicial office, The Missouri Bar began a public education campaign to provide information about Missouri's judicial system to the media and the general public. Bar officers and Missouri judges appeared on radio and television talk shows and visited with newspaper editorial boards throughout the state. A brochure titled "Voting for Missouri Judges" to familiarize voters with the selection process and the proper role of judges was published by The Missouri Bar.

In 1992, 13 years ago, The Missouri Bar, the Bar Association of the Metropolitan of St. Louis, and the Kansas City Metropolitan Bar Association conducted the first statewide evaluation of judges standing for retention. Evaluation results are published and distributed to the public in a booklet called "Voters Information about Judges" along with a photograph and biographical information for each judge.

The Missouri Non-Partisan Court Plan has served as a model for 34 other states that use merit selection to fill some or all judicial vacancies. That means that 16 states still elect their judges.

In the late 1960s when Glen Williams wrote his famous article, entitled "The Merit Plan for Judicial Selection and Tenure – Its Historical Development," Williams predicted also an end, at some point in time, to the "device of tenure by non-competitive election would pass out of the picture." This has not occurred despite the advent of special commissions or committees specifically formed to handle problems of judicial discipline and removal far better than the voters possibly could. Despite predictions, the election retention process has continued to be an important part of the Missouri Non-Partisan Court

Plan and now may be more important than ever as a result of the nature of the attacks made in the legislature concerning the judiciary.

The chief role of the non-competitive elective tenure in the future, will be a reassurance to people who are steep in the elective tradition, that in adopting a merit plan, they are not actually giving up everything but are still retaining an essential part of the elective process. There are those that still predict the elective process will be set aside as more and more states switch to initial selection by nomination and appointment. It has not come to pass that the ultimate pattern of merit selection and tenure will turn out to be nomination by a commission and appointment for life for good behavior. The public must have confidence in their ability to remove judges.

In Missouri, other than judicial retention elections and regular elections where merit selection has not been adopted, judges may be removed in one of two ways:

- a. On the recommendation of the Commission on Retirement, Removal and Discipline of Judges, Supreme Court may suspend discipline, reprimand, retire or remove a judge;
- b. Judges may be impeached by the House of Representatives. Impeachments are tried by the Supreme Court or by a special commission in the case of impeachments of the governor or a Supreme Court justice. Convictions require the concurrence of 5/7 of the Court or commission.

Many scholars agree a better key to true non-partisanship should be found. The ideal answer is for everyone involved, to keep politics completely out of mind, with respect to both commission membership and judicial appointments. That, however, is an unattainable ideal. The most practical way to neutralize opposing forces is to balance them and that is the theory behind bipartisanship in commission memberships. To make selections on a party basis for a position that is supposed to be non-partisan is a contradiction. Intellectuals who have studied merit selection believe a new and better approach is needed. They say that approach probably will be by way of perfecting our means of discovering and evaluating the affirmative traits which make for excellence in judicial performance and, having assured

themselves of getting them, indulging in the luxury of ignoring irrelevant considerations like party affiliation to the point of not caring what the judge's political leanings may have been prior to appointment, or how many of which party are now on the bench.

The state of Missouri has always been a leader with respect to impartiality and accountability of the judiciary. In fact, it is safe to say Missouri is the leader in the nation. It is important to note in the 65 year history of the Missouri Non-Partisan Court Plan, with few exceptions, there have been no substantial complaints about the plan. While bills and Constitutional Amendments have been offered from time to time in the legislature, no significant change has ever been made. There has never been a public outcry for modifications or deletions. The Missouri Non-Partisan Court Plan has been considered fair and most importantly, has continuity with both Democratic and Republican administrations.

One of the true strengths of the Missouri Non-Partisan Court Plan is a review of its history. A review of the problems it solved at the time it passed remains one of its greatest strengths. There are some who believe retention elections every six years, and even twelve years, continue to be an impediment to outstanding judges because elections continue to provide uncertainty in the judicial arena. The question must still be asked, would an experienced, competent lawyer, who had developed an outstanding law practice, and would be considered by all involved to be an outstanding candidate for the judiciary, ever subject himself to being a judge if he knew by doing so he would be subjecting himself to election and therefore, after even an extended period of time, have to return to the practice of law with no clients? Who would want to start over at the age of 50, 55 or 60? Critics of merit selection should place themselves in the shoes of the judiciary. Once they do this, it is easy to see why the nation's Founding Fathers believed an appointive judiciary was the choice of a new nation.

Today the combination of schemes and methods used to select a state's judges is almost endless. No two states are alike, and few employ the same method for choosing judges at all levels of their judiciary. Most states employ a hybrid of methods, which may include appointive and elective methods and commission assistance or nomination. In addition, each state has its own unique system of trial courts, appellate courts and courts of last resort. From this diverse collection of fifty states, the choices of judicial selection provide an excellent variety of methods to compare and contrast.

It is possible, however, to identify some trends and clear preferences among the many choices for a state looking at other examples. Forty-two states within the United States use a form of judicial appointment for at least part of the judicial branch of government. Of those 42 using an appointive method, a majority of 34 use nominating commissions to assist the governor in making selections. Of the remaining eight states, there is a wide assortment of systems which include judges appointing judges, elected councils nominating candidates or various levels of legislative branch involvement. These latter examples are vastly different than the method currently in place in Missouri.

Because of the various structures of the judiciary in our nation, a closer examination of the different levels of the judicial branch is necessary in seeing how judges are selected. Regarding the Supreme Court or a comparable court of last resort, a majority of 29 states utilize an appointment method for their highest court. Of those 29 states, 24 use nominating commissions to assist governors in making the decision. For the appointive states that do not use a commission like Missouri, four states provide for the governor to make the appointment outright without any other involvement and one method excludes the governor entirely.

Only 39 states employ an intermediate court of appeal. Of those 39 states, a majority of 22 states provide for gubernatorial appointment of which 19 of those are appointments made with commission assistance or nomination. Two states allow for a governor to make the appointment outright and one method involves the legislature.

While there has been a movement towards a commission-appointive system, it must be noted that a minority of states use an elective system for the Supreme Court and the intermediate appellate court. In the case of the Supreme Court, 21 states utilize a traditional election and in the case of the appellate court, 17 states employ elections in judicial selection. However, in a majority of each of those cases, the elections are non-partisan in nature and without the complications of party politics. Only a stark minority of states use partisan, party-politics elections in naming judges to the bench.

At the trial court level, the analysis is significantly different. There are 47 states that have a single court of general jurisdiction and three states that have two or more courts of general jurisdiction. In selecting trial court judges, the nation is in a similar position as is Missouri using a variety of methods and involving a diverse number of participants. While 30 states elect their trial court judges, at least initially, 17 of those states are non-partisan elections. Some of those elections are for the initial term with another retention method used later in one's term. Twenty-three states use an appointive system, of which 19 of those 23 require the use of a nominating commission. California residents apparently have an option of selecting the method of selection for their trial court judges.

While there are countless varieties of judicial organization and judicial selection, the movement has been towards an appointive process. Since 1980, 17 states have moved away from elections or have strengthened a process that involves a diverse collection of participants who nominate and appoint the judiciary with the common goal of integrity, impartiality and accountability.

APPENDIX 2

RESPONSE TO POLITICIZING THE JUDICIARY

As the contentiousness has spread around the country, coordinated efforts have been launched to clean up judicial elections and to try to restore public confidence in the judiciary. Those efforts include:

1. Financial disclosure laws that shine spotlights on special interest money.
2. Campaign conduct committees that advise and police candidates, created as arms of the courts or bar associations, or voluntary citizen groups.
3. Voter guides with basic information about judicial candidates.
4. A newly implemented law in North Carolina for the public financing of judicial elections which helped keep all third party advertisements out of the 2004 races. In 2002 in North Carolina, a law was passed establishing the first publicly financed judicial campaigns. The Judicial Campaign Reform Act requires state Supreme Court and Appellate judges who participate in elections to accept fundraising and spending limits. The law also made these judicial races non-partisan for the first time. More recently, the state enacted a new law on electioneering communications modeled after the federal McCain-Feingold measures for reigning in outside influence on elections. Like federal law, the North Carolina statute imposes a blackout period for broadcast ads that refer to candidates for statewide office or in the state legislature. It is 30 days prior to primaries and conventions and 60 days before general and special elections. Blackout applies to ads sponsored by both corporations and unions with special 24-hour reporting requirements for individuals and other organizations. North Carolina's new law, as well as putting restrictions on television and radio advertising, limits mass mailings and telephone banks as well.
5. Campaign conduct committees—some as creatures of the Supreme Courts or bars, some as civic groups—have roughly doubled in number in recent years. Now about a dozen monitor judicial elections statewide while a few others monitor local judicial elections. While these committees sometimes censure candidates, most of their work is responding to queries from candidates or campaigns about the right and wrong way of doing things.
6. North Carolina sent voter guides to every household in the state—four million of them — with basic information about candidates in the statewide judicial races. If there are elections, the judge becomes identified with partisan politics, when his is the one office above all others that should have the respect of the people; as Thomas Jefferson said, he “should be absolutely independent of politics.”

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