

How Kansas & Missouri's Missouri Plan  
are Broken  
and  
A Proposal for Reform

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*All views expressed herein are of the author and not of any current or former employer or any organization with which I am associated.*

# Judge Welliver Oct. 28, 1985

“Reduced to the plainest terms, judges have no right to pick their successors or colleagues and lawyers have no right to pick their judges .”

MO Supreme Court Chief Justice Warren D. Welliver address to the Missouri Senate in Oct. 28, 1985.

“[C]ourts belong to the people, not to the lawyers and judges . . .” *Id.*

“I predict you will have no great groundswell from my profession to aid you in correcting the problem” of judges and lawyers picking judges. *Id.*

# Kansas & Missouri's Missouri Plan and a Proposal to Update

- A. Overview of Missouri and Kansas “form of” the Missouri Plan.
- B. The 5 Myths of Kansas & Missouri's Missouri Plan
  1. The Process is “Non-Partisan”
  2. Selections are Based on “Merit”
  3. Missouri & Kansas “form of” Missouri Plan Has Been Adopted in 21, 29 – or Define to Fit A Number of States.
  4. Retention Elections Are a Proper Check.
  5. Access by the Press and the Public has been Properly Withheld Since All Deliberations and Discussions Stay Secret Within the Commission.
- C. A Proposal for Reform that is still a form of the “Missouri Plan”.

# Missouri and Kansas forms of Missouri Plan

## Kansas

- 9 member Commission
  - 4 Non Lawyers appointed by the Governor/County Commissioners for lower courts
  - 5 Lawyers elected only by Lawyers and Geographically disperse
  - 4 year terms
- Retention elections every 6 Years

## Missouri

- 7 member Commission
  - 3 Non-Lawyers Appointed by Gov to 6 year terms.
  - 3 Lawyers elected only by Lawyers.
  - Chief Justice/Judge of Court as Chair.
  - 6 year terms
- Retention elections every 12 years for Sup. Ct.

# Public Input into State Judicial Selection Systems

Election		Appointment		"Merit" Selection			
Partisan	Non-Partisan	By Legislature	By Governor	Legislature Influenced Commission	Governor Appointed Commish	State Bar Appointed Commish	State Bar Controls Commish
Alabama Illinois Louisiana New Mexico Penn. Texas W. Virginia	Arkansas Georgia Idaho Kentucky Michigan Minnesota Mississippi Montana Nevada N. C. N.D. Ohio Oregon Washington Wisconsin	S. C. Virginia	California Maine Mass. New Hamp. New Jersey Delaware	Connecticut D.C Hawaii New York Rhode Island Vermont	Arizona Colorado Florida Maryland Utah	Oklahoma S. Dakota Tennessee	Alaska Indiana Iowa Kansas Missouri Nebraska Wyoming
		— 2	— 5	— 5 + DC	— 6	— 3	— 7
							Total: 28 + DC

# Myth 1: Plan is “Non-Partisan”

You have a better chance of winning the lottery -- twice.

- Since 1995, there have been 6 Appointments to the Missouri Supreme Court.
  - 12 years of Democrat Governors
  - 5 vacancies on the Missouri Supreme Court
  - 15 possible nominees
  - 15 Democrat nominees
- In 2007, with a Republican Governor, Commission
  - 3 nominees
  - 2 Democrats and 1 Republican.
- Odds of such being pure coincidence are more than ONE BILLION TO ONE.
- Analogy – go to Vegas and pull the slots – even with only 2 possible outcomes – and get 4 of a kind 5 times in a row followed by 2 Pair.

# Myth 1: Plan is Non-Partisan (cont.)

## Abused by Democrats and Republicans

Abuse by Republicans in Kansas – the Animus for Change.

- In 1956 Gov. Hall, having lost his party's primary, resigns 11 days before inauguration of his successor.
- Republican Lt. Gov. McCuish succeeds him for the last 11 days and appoints Gov. Hall to the Kansas Supreme Court.
- Kansas adopts its form of the Missouri Plan in 1958.

Abuse by Republicans in Missouri

- In 1985, Republican Governor nominates his 33 year old Chief of Staff after the Commission puts him on the panel at the Governor's request.
  - Very little legal experience, part-time municipal court judge but good academic career.
  - Democrats call for reform.
  - Missouri Bar calls for reform. "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). Including applying parts of the Sunshine Law to the Commission.
  - Judge Welliver 1985 address to the Senate Interim Committee on Missouri Plan.
  - Pursue legislation to prevent the Governor from communicating with the Commission.

# Myth 1: Plan is Non-Partisan (cont.)

Abused by Democrats and Republicans

- Mo. Supreme Court Judge X Appointed in 1998 by Dem
  - Chief Counsel to Democrat Governor Carnahan
  - Ran as Dem for Attorney General in 1988 and 1992.
  - No judicial experience.
- Mo. Supreme Court Judge Y Appointed in 1995 by Dem
  - Dem Chair of Missouri House Judiciary Commission
  - One year on Appellate Court
- Mo. Supreme Court Judge Z Appointed in 2002 by Dem
  - Contributed \$30,000 to Democrats in 3 years prior to appointment to Missouri Court of Appeals.
  - President and VP of Missouri Bar

# All 3 Lawyer member of Commission all Current or Former Plaintiffs Bar/MATA Leadership

- Nancy Mogab: Personal Injury lawyer. MATA Governor.
- Richard McLeod: Personal Injury lawyer. MATA Board of Governors.
- Steve Garner: Personal injury lawyer. MATA Board of Governor's. Wrote article, *"How to Strip your Opponent Naked and Make them Beg to Pay You Money."*
- October 10, 2007, Lynn Henry, President of MATA sends "Action Alert" to all MATA members in Missouri with an urgent message to call all their lawyer friends to vote for John Wooddell, a former member of the MATA Board of Governors. "He is dedicated to the protection of the non-partisan court plan . . ." [T]his election is important to all of us" in MATA.

# Myth 2: Plan is based on “Merit”

## Compare Nominee 1 to Applicant A

- Summer 2007 – 30 Applicants AJC Chooses Three Nominees
  - Nominee 1 of 3 (Democrat).
    - Lowest Bar Rating (73%) of ANY Appellate or Supreme Court Judge in the 2006 retention election.
    - Bottom 20% of all judges rated in St. Louis in the 2006 retention.
      - Compare Chair’s remarks at Annual Bar Meeting to inform citizens of Bar ratings.
  - Nominee 2 of 3 (Republican).
    - In 1993 Called for the Reform of Missouri’s “form of” Missouri Plan.
    - 2.5 GPA in law school. Graduated in bottom half.
    - Concurred 51 of 51 possible chances with Chair of Commission while serving together on Court of Appeals.
  - Compare Applicant A – Did NOT Make Final 3 (Democrat)
    - At top of undergrad journalism class at Mizzou and Harvard Law grad.
    - Partner at major KC law firm.
    - More trial and appellate court experience than Nominee 1
    - Same gender and race as Nominee 1; same gender as Nominee 2.

# Myth 3: Plan Has Been Adopted All Across the Nation

- Play on words: “*Some form of*” the Missouri Plan.
  - American Judicature Society shows 24 States with Merit Selection Plan.
  - Missouri site then says 34 states have used Missouri’s Missouri Plan as a Model. No explanation of the inconsistency.
  - 7 States with Missouri’s form of Missouri Plan.
- Missouri “form of” Mo. Plan is LEAST accountable of all “Mo. Plans”.
- “Some form” is defined as any system that has a Commission.
  - Governor and Legislature still do Nomination and Confirmation.
- Missouri’s Missouri Plan is an extreme position falling into the category of the least of all public accountability.
  - American Judicature Society Model Merit Selection Plan: “If a judge is a member of the Commission, the judge should have limited power so as to avoid having undue influence over other Commission members.” Source: <http://www.ajs.org/js/provisions.pdf>
  - In Missouri, the Judge is the Chair of the Commission.
- Chief Justice Welliver: “I start with the assumption that the evidence is overwhelming for removing the Chief Justice from the selection process.” Oct. 28, 1985 Senate Interim Committee

# Missouri Plans with Legislative Confirmation

- Legislative Confirmation
  - Connecticut
  - Delaware
  - D.C.
  - Hawaii
  - Maine
  - Maryland
  - New Jersey
  - New York
  - Rhode Island (entire general assembly)
  - Utah
  - Vermont
- Gov Nominates Commission Approves
  - **Massachusetts:** Judges are nominated by the governor and approved by the “governor's council,” also referred to as the executive council. That council is a constitutionally authorized body that is elected annually by the Massachusetts legislature.
  - **New Hampshire:** New Hampshire judges are nominated by the governor and confirmed by the executive council. The executive council is a five-member body elected by the people to advise the governor.

# Myth 4: Retention Elections Is an Effective “Check” by Voters.

- 2006 Retention Election: Judge with the lowest rating ever (30%) is retained by a margin that is statistically insignificant to those in the 80+% range.
- Not One Single Appellate or Supreme Court Judge EVER has Lost Retention in 70 Years.
- Only 3 Circuit Judges in 70 years not retained
  - one under indictment.
- 30 Year Mo. Plan 10 State Study only 1.3% of Judges lost retention.
- Voter “Roll-off” averages 35%.
  - With typical 60-65% retention = Less than majority.
- True “Baby out with the Bathwater” crisis potential.

# Myth 5: Sunshine Law Does NOT Apply to the Appellate Judicial Commission

- A “Rule” is not a “Law”
- Sunshine Law adopted after the “Rule” and Constitutional Provision.
  - Did not except the AJC from the Sunshine Law.
  - Policy is to construe in favor of public and press access to government meetings and deliberations.
- American Judicature Society Model Merit Selection [Missouri] Plan Calls for Open Meetings. (Source: <http://www.ajs.org/js/provisions.pdf>)
  - “Commission meetings should be as open as possible.”
  - “[S]ome states may need to exempt final deliberations from [Sunshine Laws].”
- Open Questions as to Whether Confidentiality is Selectively Applied
  - Justice Stith testified at Shields’ Hearing that the list of applicants was distributed to “other judges” in violation of Mo. Sup. Ct Rule.
  - Many unanswered questions as to violation by Mo. Sup. Ct.
  - Influence of MATA
  - Whether Mo. Bar Input was Sought on Judicial Nominees.
  - Like Privilege, exception under Rule applies universally or should be waived as to all rather than interested few

# B: Proposal for New Missouri Plan in Missouri

- Goals
  - Create a Truly Bi-Partisan Commission with equal number of Democrats and Republicans on a Commission.
    - In Line with American Judicature Society Model Merit Selection Plan (AJS Model Plan).
    - Study shows that when equal number from each party serve on a commission, party politics is least influential.
  - Restore some Level of Public Accountability.
    - Modern trend and Option under the AJS Model Plan.
    - The Peoples' elected representatives having input is Democracy.
  - Establish a Process that is Open to the Public.
    - Recommended under the AJS Model Plan

# New Mo. Plan: Overview

- 10 Persons Bi-Partisan Commission (5-5) Reviews Applicants and makes 5 recommendations to the Governor.
- Governor must choose one.
- Governor selects nominee and forwards to Senate for simple majority confirmation.
- Mandatory 90 Day up or Down Senate Vote.
- Mo. Bar May Provide Rating of Exceptionally Qualified, Qualified, No Opinion or Unqualified.
- Senate may Delegate Hearing to Committee.
- All Persons Appearing Do So Under Oath. May be Represented by Counsel (including Nominee).
- Consider Appointment for Life (not in draft).

# Commission Composition

- 10 Member Bi-Partisan Commission.
  - Governor Appoints 2 Lawyers + 2 Non-Lawyers, with one each from the minority and majority parties of the House.
  - Senate: Majority and Minority each get 1 appointee who may or may not be a lawyer
  - House: Majority and Minority each get 1 appointee who may or may not be a lawyer.
  - Attorney General: 2 Lawyers, one from the minority and majority of the House.
- All serve two year term starting January 21 and at pleasure of appointing body.
  - Can have multiple terms.
  - May not be appointed to the bench for 2 years after service on Commission. Applies to spouse and children for 1 year after service on the Commission.

# What Next?

- Rise to the Occasion and Lead the Country Again.
- Get Engaged – January Start of Legislative Session.
- Focus on Facts – Not on Untested Assumptions.
  - Numerous states have Missouri Plans which are an update to Missouri's 1940 form of the Missouri Plan.
- Issue is: What is Good Government – What is Better Government.
- Sacrificing Principles for Power Results in Loosing Both.