

The Need to Update the Missouri Plan for Judicial Selection

Special Committee on General Laws

February 5, 2008

Jefferson City, Missouri

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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 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.*

The Need to Update the Missouri Plan

A. The Facts of the Missouri Plan.

1. Missouri's Form of the Missouri Plan is an Extreme Position, the Most Unaccountable and Closed of All Judicial Selection Methods in the United States.
2. Judicial Selection is Partisan and Political -- Most Notably by the Fact that in 12 years the Commission has Nominated 17 Democrats and only 1 Republican for the Missouri Supreme Court. Antidote is Sunshine Law.
3. The Commission has Failed to Use Merit as the Criteria for Selecting Judges and is Focused on Politics and Ensuring the Personal Injury Lawyers Hold All 3 Lawyer Positions.
4. Consequence is American Tort Reform Association Calls Missouri a "Judicial Hellhole" and US Chamber of Commerce Ranks Missouri in Bottom Third. Wall Street Journal Issues 3 Editorials in 2007 Calling for Change.
5. Empirical Data Shows Retention Elections Are Not a Proper Check.
6. The Courts Should Not be Permitted to By-Pass Acts of the Legislature by Simply Creating a "Rule" that then Applies a LOWER standard to its Commissions than Apply to the Rest of Government.

B. Representative Cox Proposal to Update and maintain the "Missouri Plan".

Missouri's Form of the Missouri Plan is an Extreme Position Allowing the Lowest Degree of Public Input into the Judicial Selection System.
 The LEMBKE and COX proposals merely move Missouri to a Moderate Position

Highest Degree of Public Input								Lowest Degree of Public Input	
Election		Appointment		"Missouri Plan/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 LEMBKE	Connecticut D.C Hawaii New York Rhode Island Vermont	Arizona Colorado Florida Maryland Utah COX	Oklahoma S. Dakota Tennessee	Alaska Indiana Iowa Kansas Missouri Nebraska Wyoming		
		— 2	— 5	— 5 + DC	— 6	— 3	— 7	Total: 28 + DC	

Judicial Selection Plan is Partisan and Playing Politics Behind closed Doors. “Non-Partisan”

- Since 1995, there to the Missouri Supreme Court.
 - The Appellate Judicial Commission forwards 3 Nominees for Each Open Slot.
 - Of the 18 Nominees forward by the Commission over the Past 12 years, 17 Nominees have been Democrats.
- Abuse by Republicans
 - In 1985, Governor Ashcroft nominates Chip Robertson, his 33 year old Chief of Staff after the Commission puts him on the panel at the Governor’s request.
 - Only a few years as a practicing lawyer yet the Commission chooses him as one of the top 3 most qualified lawyers or judges in the entire state to serve on Missouri’s highest court.
 - 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.

Politics in the Appointment

- Supreme Court Judge Wolff Appointed in 1998 by Dem
 - Chief Counsel to Democrat Governor Carnahan
 - Ran as Dem for Attorney General in 1988 and 1992.
 - No judicial experience.
- Supreme Court Judge White Appointed in 1995 by Dem
 - Dem Chair of Missouri House Judiciary Commission
 - One year on Appellate Court
- Supreme Court Judge Teitelman 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

Commission Fails to Insulate Judicial Selection Process from Plaintiffs Bar Selecting Judges

- All 3 Lawyer members of 2007 Commission were Current or Former Members of the Board of Governors of Personal Injury 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."*
- MATA Admits the Importance of Ensuring Plaintiffs' Lawyers Control of All 3 – 40% -- Lawyer Members of the Commission
 - 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. Judge Baker (St. Louis, Democrat).
 - Lowest Bar Rating (73%) of ANY Appellate or Supreme Court Judge in the 2006 retention election.
 - Television Reporter with 3 years legal experience before being named a judge.
 - 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. Judge Breckenridge (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 Justice Stith, Chair of Commission while serving together on Court of Appeals.
 - Compare Applicant A – Judge Hardwick 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 Judge Baker.
 - Same political party, gender and race as Judge Baker; same gender as Judge Breckenridge.

Consequence of Plaintiffs' Lawyers Dominating Judicial Selection Process in Secret Meetings is a Significant Negative Effect on the Business Climate in Missouri.

- US Chamber of Commerce Study for 2007 Released January 2008.
 - Missouri Ranked in Bottom Third of All States.
 - The Chamber stated that *“the price tag of tort litigation for the entire population of Missouri is more than \$5.1 billion.”*
 - *“An unfair legal system sucks the life out of a state's economy. It affects business expansion, it affects jobs and it takes money out of consumers pockets.”*
- *Wall Street Journal* – the Most Influential Business Publication on the Planet – Calls for Reform in Three Separate Editorials in 2007. Dec. 22, 2007 Excerpt:
 - *“However nobly the Missouri plan began, the current process is doing no favors to fairness, or to justice. . . . Missouri's courts are every bit as hung up in politics as they are in other states. The difference is that in Missouri the process happens behind closed doors. A democratic system of choosing judges requires a transparent process -- and accountability for those who make the choice.”*
- American Tort Reform Association Study for 2007 Released in January 2008.
 - Missouri is a *“Judicial Hellhole”*
 - Missouri will become known *“as the ‘Show Me the Money’ state if its high court continues to issue outlier, pro-plaintiff rulings. This year, the court permitted individuals that had experienced no injury to sue for medical monitoring, an approach rejected by most other states that have recently considered the issue.”*

Judges Should Not Appoint their Colleagues and Successors. Remove the Judges from the Commission

- 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.
- Missouri Supreme Court Judge Welliver:
"I start with the assumption that the evidence is overwhelming for removing the Chief Justice from the selection process." Speech of Oct. 28, 1985 before the Senate Interim Committee

Missouri Plans with Legislative Confirmation of Governor Nominee

- 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.

Retention Elections Are Not 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.
 - One moved by Mo. Supreme Court to Senior Status.
- 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.

The Court Administered Judicial Selection Process Should Have to Abide by the Same Sunshine Law as the Rest of Federal, State and Local Government

- A simple 4 Judge Majority of the Missouri Supreme Court Could Change the Rule that Allegedly Exempts the Commissions from the Sunshine Law which Applies to All Other Areas of Government.
 - The Legislature needs to act. The same laws that apply to the rest of Government should equally apply to the judicial selection process, period.
 - The Sunshine Law was passed through the House after bi-partisan committee hearings, through the Senate, back to conference, passed again and eventually signed by the Governor. Amazingly 4 Supreme Court judges then simply decide to create a Rule that says this law does not apply to its Commission.
- The Courts Should at all Times Try to Hold Themselves to a Higher Standard than that Minimum that the Law Creates. By Exempting itself from the Sunshine Law, the Court has Created a LOWER standard.
- 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].”
- The Missouri Supreme Court itself Violates its Own Rule.
 - 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.

B: Proposal by Representative Cox

- Goals
 - Restore some Level of Public Accountability.
 - Whether a Democrat, Republican or Independent is in the Governor's office, Elected Officials Should be Held Responsible to the Electorate for the Appointment of Judges.
 - The Peoples' elected representatives Need an Additional Check.
 - Preferred Method is for Senate Confirmation of the Governor's Choice.
 - In the Least, have the Commissioner's Subject to Senate Confirmation in the Same Way as Gubernatorial Appointments are Subject to Senate Confirmation.
 - Establish a Process that is Open to the Public.
 - It is Entirely Inappropriate that the Judiciary Creates a Lower Standard for Openness of its Own Administered Commission than that for the Rest of Government.

Extremely Small Adjustments to Plan

- Application of Open Government Principles to Judicial Selection Commission.
 - The following should be public and open: Names of applicants, Commission and Governor written questions and answers (omit personal data), Commission interviews of applicants conducted in open session, Commission contact with non-commissioners concerning applicants disclosed, including MATA and Missouri Bar.
 - The following should be confidential: Address and personal information of applicant, State Police background report, final deliberations of Commission discussing and voting on final 3.
- Replace Chief Justice Position with Governor Appointee.
 - All 3 Lawyer Held Positions Not Affected.
 - Non-Lawyers Have 60% of Vote and Lawyers 40% of Vote.
 - Removes Conflict of Judges Appointing Successors and Colleagues.
- Governor May Reject Panel and Request New Panel.
 - Prevents Commission from De-Facto Making Selection. (See Summer 2007 where Democrat Controlled Commission Submitted 2 Dems and 1 Repub.)
 - With knowledge of this capability, Commission most likely to take into account Governor's judicial philosophy which the People can then hold accountable at the ballot box.
- All Commissioners Subject to Gubernatorial Appointments Confirmation Process in Senate the Same as Many Commissions.
 - Numerous Cabinet and Commission Positions are Subject to Senate Confirmation. This low standard ought to apply to Commissioners who are playing a critical role of Gatekeeper.
 - Compromise from Judicial Nominee being Subject to Confirmation.
- Terms are 4 years beginning on January 15th of Gubernatorial Election Year.
 - Ensures Accountability of Incoming Governor, subject to Senate Confirmation.
 - No Midnight Appointments by Outgoing Governor (e.g., Governor Holden).
 - Commissioner should not be allowed to practice in courts where they are nominating the judges.