

Missouri Law Review

Volume 35
Issue 1 *Winter 1970*

Article 11

Winter 1970

Book Review

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Book Review, 35 Mo. L. REV. (1970)

Available at: <https://scholarship.law.missouri.edu/mlr/vol35/iss1/11>

This Book Review is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Book Review

Richard A. Watson and Rondal G. Downing: *The Politics of the Bench and the Bar*, New York, John Wiley and Sons, Inc., 1969, pp. xx, 393

The authors are members of the Department of Political Science of the University of Missouri. They present a comprehensive study of the "Missouri Plan" for the selection of judges as it has operated from the time of its adoption in 1940, through the end of 1964. The book is replete with tables and statistics, and with material gathered from questionnaires and in interviews. The product is of great value to students of the processes of judicial selection.

The authors undertake to answer the difficult question of whether judges appointed under the plan are "better" than those chosen in partisan elections. The study employs five statistical compilations as follows: (1) lawyer evaluation of quality; (2) lawyer evaluation of impartiality; (3) standing in bar polls; (4) standing in popular vote in retention; and (5) affirmance-reversal record. The authors concede that the use of the last-mentioned factor may be subject to question since the judge who is too afraid of reversal may be lacking in initiative. They do not use another factor which other students of judicial merit have employed—the number of cases disposed. The explanation is that "quality" is more important than "quantity." Yet the volume figure might have been helpful as an additional factor, for ability to move the docket is important.

The conclusion is clearly and definitely favorable to the plan, although not overwhelmingly so. The authors state that even lawyers who are opposed to the plan seem to prefer "plan" judges to pre-plan ones. The authors find no support for some of the predictions made about the plan when it was under consideration. There is nothing to indicate that plan judges are more "conservative" than elected judges, or that the appointed judges are chosen in undue proportions from among graduates of the "prestige" law schools. It also appears that the plan has put an end to the selection of "very bad" judges.

The skeptic might say that the study fails to show any wide margin of superiority for judges appointed under the plan, when compared to judges of the same courts who had been elected and were serving at the time the plan was adopted. Such a contention should be evaluated in light of present-day political conditions and the calibre of judges they would produce. The expense of running for election has increased year after year. In a partisan election a candidate must have organizational support in order to have any chance in a big-city primary. In times of full employment qualified lawyers are reluctant to stand for judicial office in contested elections. In light of the above factors, it is fair to say that competent judges have

been appointed under the plan, and that there is no reason to believe that a return to political election would produce improvement.

A large part of the study is devoted to a discussion of the "politics" of judicial selection. The authors restate the true but trite proposition that the plan does not eliminate politics in judicial selection but merely substitutes one type of politics for another. They then enter into a detailed analysis of the plan in operation, relying to a great extent upon interviews and answers to questionnaires. The conclusions are interesting but must be received with reservations.

The authors discuss various "games" of panel stacking, described as "wiring," "rigging," and "loading," and intimate that these games are engaged in frequently in the selection process. This would indicate a cavalier attitude among the commission members. Let us examine the authors' claims.

A panel is said to be "wired" if the governor has made his wishes known to the commission and the commission obliges by nominating the man the governor has expressed an interest in. The authors say that they are

unable to find any reliable evidence that governors as a general practice convey their wishes in appointments to lay commissioners either directly or through intermediaries, although there is little question that this has occurred on certain occasions (p. 47.)

Even if the governor did make his preference known, there is no particular reason why the attorneys and members of the bench who comprise the commission would feel obliged to accommodate him. On some occasions, indeed, gubernatorial pressure has worked to the candidate's disadvantage. Nor does a communication of the governor's desires from a self-appointed emissary of the governor prove the case. Politicians regularly play the game of name-dropping. So the appearance on a panel of a lawyer who is known to stand well with the governor does not provide reason for criticism of the commission. There is also the possibility that the panelist may have good qualifications and may have delayed making his availability known until a friendly governor took office. If the nominee is qualified, is the commission not justified in certifying him and placing the responsibility on the governor?

Another game is that of "rigging," which consists of certifying a panel of nominees in which one member is certain to be appointed. A "rigged" panel is not necessarily one which is pleasing to the governor. It might consist of one member barely tolerable and two quite objectionable to the governor. The vice in rigging is that the commission usurps the appointment prerogative of the governor by not providing him with a real choice.

It is often easy to say, with hindsight, that a panel is "rigged" because it contains only one logical appointee, but this may not be the case at all. Sometimes one panelist will be much better known than the others, and, if he is also on good terms with the governor, his appointment may seem a

foregone conclusion. Yet his qualifications may be such that the commission had every justification for including him as one of the three nominees.

The supposed rigging might well be the work of a single commission member. Let us suppose that Commissioner *A* is anxious to promote the candidacy of *X*, a well-qualified lawyer of Democratic antecedents but without political connections. Suppose also that other commissioners are impressed by *Y*, also a well-qualified Democrat. *A* knows of an ancient grievance which the governor has against *Y*. *A* might be able to persuade the commission to tender a panel consisting of *X*, *Y*, and a Republican. Those who know all the details will say that this panel is rigged. Yet the rigging is the work of a single commissioner and the others will hotly and truthfully deny any charge that they tried to dictate the appointment. When only three men are named to the panel there is always some opportunity for maneuvering, but this is no reason to conclude that such maneuvering has dominated the selection process.

The third game is referred to as "loading," and consists of the selection of panels in which all members have a common characteristic: three Republicans, three Democrats, three Catholics, *etc.* The study makes reference to a "notorious" instance in which three Republicans were certified for a court of appeals vacancy. Why, one might ask, is the incident notorious? Might not a commission feel that a particular court was dominated by Democrats to such an extent that an appointment should be made from the other party? So long as governors think politically, commissioners may be tempted to do so also. Or might a commission not think that a minority group should have representation on a multi-judge court? So long as all panelists are qualified, it is hard to see that the commission has a duty to diversify.

The authors further make the valid point that any consideration of the Missouri Plan must give attention to the governor's role. Recent Missouri governors have had a strong political orientation and generally have operated on the assumption that only persons with the proper political credentials in addition to the necessary statutory qualifications may hold public office. The spoils system has been strictly adhered to. If the governor's choice in filling bench vacancies was not limited to a panel of three men nominated by the commission, vacancies would be filled with allies of the governor. And those appointed under this spoils system approach, would probably be able to secure election, if experience in other states is a reliable guide. The court plan restricts the governor's freedom of choice but there is still the tendency to assess the political implications of the panel nominees. If future governors would indicate that they will give primary attention to merit, and less attention to politics, confidence in the court plan would be greatly increased and discussion of panel-stacking games would abate.

There is additional ground for criticism of the study in the authors' use of the interview material. They neither identify the persons interviewed,

nor do they identify the judges and unsuccessful panel members who are discussed by the interviewees. No doubt it is best not to include these identifications, but this makes checking for accuracy virtually impossible. Thus, many of the authors' assertions stand without authoritative weight and are subject to serious question. For example, at page 65, the authors make the statement that "on one occasion, three attorneys went to the nominating commission on behalf of a colleague, only to end up themselves on the panel as the three nominees." This assertion seems unlikely. Commissions do not ordinarily hold sessions where lawyers may "go to" them. The authors are reporting what somebody told them. There is no possibility of checking.

At page 144 the authors discuss a supposed outstate influence in appointments to the St. Louis Circuit Court, and report as follows: "It is said that many judges have formerly lived outstate; indeed, some are accused of having moved to St. Louis solely in order to seek a circuit judgeship." A look at the bluebooks shows that of the 22 judges appointed to the St. Louis Circuit Court under the plan, only two had practiced in outstate Missouri. One came to St. Louis in 1919 and was appointed in 1945. The other came to the city in 1942 and became a judge in 1955. Sixteen of the appointees were natives of St. Louis. The authors have perpetuated an idle rumor which should have been checked.

On page 190 the authors present an instance of supposed gubernatorial "retaliation" against the appellate commission for "shamefully loading panels . . ." and report the statement of an interviewee that one panel was "so bad" that the governor "made his appointment with an eye to . . . affronting the Chief Justice and the nominating commission. . . ." There has been no appellate appointment since the plan has been in effect which could properly be described as an "affront" to the commission which named the panel. Nor does this reviewer know of any consistent practice of "loading" panels which could appropriately be characterized as "shameful." The authors, when reporting this statement, should have indicated that it is only one man's opinion. Instead, it is set out in the text without comment. The foregoing examples lead one to conclude that the authors have not fully met their responsibility of verifying the reliability of the statements made by interviewees by determining whether particular statements represent views of some currency or are simply individual opinions.

It is also unfortunate that the study, although not published until 1969, does not deal in any way with the years after 1964. During this five-year period a two-term governor has emerged, almost all pre-plan judges have been replaced, there has been an increased selection of younger men, and Supreme Court appointments among commissioners of the Court has virtually ceased (although commissioners are included on the panels with some regularity). There should at least have been a summary supplemental chapter of these developments even if the authors were unable to apply their detailed study methods to the intervening years.

The authors do point up many questions which will be significant in the future. Do the commissions seek to present panels consisting of the best available lawyers, or are they diverted by extraneous and irrelevant considerations? Can the governors be persuaded to think less about politics and more about the need for able judges? Has the plan succeeded reasonably well, in spite of its accidents? Should it be extended? Is there any conceivable reason to think that any other method would be better? Those who are interested in the quality of the courts must ask these questions, and the Watson-Downing study should help them.

CHARLES B. BLACKMAR*

*A.B., Princeton University, 1942; J.D., University of Michigan, 1948; Admitted to Missouri Bar, 1948; Practice, Kansas City, Missouri, 1948-1966; Professor of Law, St. Louis University since 1966.

