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Symposium:

Mulling Over the Missouri Plan: A Review of State Judicial Selection and Retention Systems

Foreword

**Sandra Day O'Connor, Earl F. Nelson,
and State Judicial Selection and Retention**

R. Lawrence Dessem^{*}

In difficult cases, in unpopular cases, in cases that may draw criticism from the executive branch of government, the legislature, the media, or the general populace, it is essential that judges be insulated from public pressure. However much we believe in the strength and integrity of the human spirit, we cannot expect judges to do justice without establishing an institutional framework that guarantees them that their next decision, however loathsome or unpopular, will not be their last.¹

It is my great pleasure to introduce the *Missouri Law Review's* 2009 symposium: "Mulling Over the Missouri Plan: A Review of State Judicial Selection and Retention Systems." This has been a labor of love by the entire staff of the *Missouri Law Review*, and both the February 27 symposium and the written symposium that follows are a work product that should serve as a

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1. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 275 (2003).

touchstone for scholars, policy-makers, and all members of the public who are interested in state judicial selection and retention systems and the current efforts to amend and extend those systems.²

In recent years there has been a great deal of controversy concerning the selection and retention of state judges.³ Not only has this debate played out in the news media,⁴ but it also has reached the national consciousness through

2. While virtually the entire faculty and staff of the University of Missouri School of Law contributed in one way or another to the success of the live and printed symposium, special thanks must go to Associate Dean Thom Lambert (who served as an active advisor to the *Missouri Law Review* concerning this symposium), to all symposium presenters, and to symposium moderators Thom Lambert and Professors Martha Dragich and Chris Wells (who also has served as *Missouri Law Review* faculty advisor for many years). Law school staff members Robin Nichols, Judy Tayloe, Casey Baker, Darrell Jaeger, Resa Kerns, Alan Whitman, Scott Weiser, Kathy Smith, and Alisha Rychnovsky made significant contributions to the live symposium, as did Associate Dean James Devine. I also thank John Dethman for his research assistance in connection with this symposium introduction. All members of the *Missouri Law Review* contributed to the success of this symposium, but it is appropriate to specially acknowledge *Missouri Law Review* symposium leaders Matt Feldhaus, Stephanie Bell, Jeff McCarther, Adam Hanna, and Bethany Findley, as well as 2009-2010 Editor-in-Chief Dana Strueby, who has led the effort to publish the symposium papers in this issue of the *Missouri Law Review*.

3. As the editors of the *Missouri Law Review* stated in the symposium brochure, The Missouri Plan was originally conceived and adopted by many states to eliminate, or at least reduce, the role of politics in judicial selection and decision-making. Yet, the [most] recent debate has been almost entirely political and has led to new special interest groups, expensive media campaigns and legislation promising reform.

Brochure, MO. L. REV., *Mulling Over the Missouri Plan: A Review of State Judicial Selection Systems* (Feb. 27, 2009) (on file with author).

4. E.g., Editorial, *Without Judicial Merit*, WALL ST. J., Aug. 23, 2008, at A10, available at <http://online.wsj.com/article/SB121944715202565133.html>; Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, at A1, available at http://www.nytimes.com/2004/10/24/politics/campaign/24judicial.html?_r=1; Mike France & Lorraine Woellert, *The Battle Over the Courts: How Politics, Ideology, and Special Interests Are Compromising the U. S. Justice System*, BUS. WK., Sept. 27, 2004, at 36, available at http://www.businessweek.com/magazine/content/04_39/b3901001_mz001.htm. Some of the recent media attention has focused on the case of *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), in which one of the justices of the Supreme Court of Appeals of West Virginia voted to overturn a jury verdict against a company whose chairman and chief executive officer had contributed \$3,000,000 to help defeat that justice's judicial opponent. *Id.* at 2258-59, 2264. E.g., Andrew Clevenger, *U.S. Supreme Court to Hear Case Regarding W.V. Supreme Court*, CHARLESTON GAZETTE, Nov. 15, 2008, available at <http://www.wvgazette.com/News/200811140690>; Joan Biskupic, *At the Supreme Court, A Case with the Feel of a Best Seller*, USA TODAY, Feb. 16, 2009, at A1, available at http://www.usatoday.com/printedition/news/20090217/1agrisham_court17_cv.art.htm. In a 5-4 decision, the Supreme Court held that, in the circum-

one of John Grisham's bestselling novels.⁵ These battles have occurred in Missouri as well, where there have been numerous attempts to amend the Missouri Nonpartisan Court Plan⁶ in recent years.⁷ Just as significantly, the voters in Greene County, Missouri, last November voted to bring their county within the selection provisions of the Missouri Nonpartisan Court Plan, thus becoming the first jurisdiction in more than two decades to move from judicial elections to a system of nonpartisan appointment and subsequent voter confirmation.⁸

While the proponents and opponents of various systems of state judicial selection and retention have created a great amount of heat concerning these issues, this symposium was developed in an effort to shed some light on state judicial selection and retention. The symposium's title is instructive: "Mulling Over the Missouri Plan: A Review of State Judicial Selection and Retention Systems." The verb "mull" comes from Middle English, and its primary definitions include "to grind or mix thoroughly . . . : [to] pulverize" and "to consider . . . at length . . . [to] ponder."⁹ Far too much of the recent discussion concerning judicial selection and retention can be classified under the first definition because of its grinding nature and the attempt to pulverize the arguments of others. The goal of this symposium, however, is to fall within the second definition by providing a forum to consider at length vari-

tances of this case, the Due Process Clause required judicial recusal. *Caperton*, 129 S. Ct. at 2267.

5. JOHN GRISHAM, *THE APPEAL* (2008). See also Penny J. White, "The Appeal" to the Masses, 86 DEN. U. L. REV. 251 (2008). Public controversy concerning judicial selection and retention may have been heightened in recent years by the Supreme Court decision in *Bush v. Gore*, 531 U.S. 98 (2000), which determined the 2000 presidential election, and state judicial campaigning that followed the Court's decision in *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). Recent battles over state judicial appointment and retention systems also have been waged against the background of increasingly contentious confirmation debates concerning federal judicial nominees. David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033 (2008) (reviewing BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* (2006) and JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007)).

6. MO. CONST. art. V, §§ 25(a)-(g).

7. See, e.g., H.J. Res. 10, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009); S.J. Res. 9, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009); H.J. Res. 31, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007); H.J. Res. 33, 94th Gen. Assem., 1st Sess. (Mo. 2007); H.J. Res. 34, 94th Gen. Assem., 1st Sess. (Mo. 2007).

8. Dirk VanderHart, *Court Plan OK'd Despite Confusion*, SPRINGFIELD NEWS-LEADER, Nov. 7, 2009; Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 75 MO. L. REV. 479, 486 (2009).

9. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (2002).

ous perspectives on state judicial selection and retention and to ponder these different arguments and analyses.

Both the live and published symposium attracted some of the leading authorities on judicial selection and retention – from Missouri and from across the nation. In addition to Justice O'Connor's Nelson Lecture, the other symposium discussions were organized into three major areas. The initial set of papers addressed the topic "Special Interest Influence: Balancing Independence and Accountability."¹⁰ The second panel of presentations focused on "Retention Elections in a Merit-Selection System: Balancing the Will of the Public with the Need for Judicial Independence and Accountability."¹¹ The concluding panel considered "The Fallacies and Fixables of Merit Selection and the Constituencies that Support Missouri Plan Reform."¹²

The symposium highlight was Justice Sandra Day O'Connor's Earl F. Nelson Lecture, which is included in the published symposium.¹³ Since her retirement from the Supreme Court, Justice O'Connor has devoted a significant amount of her professional energies to raising public consciousness concerning recent attacks on judicial independence.¹⁴ It is particularly appropriate that the endowed lecture that Justice O'Connor gave as part of this sym-

10. The articles of this written symposium under this broad topic include Michael R. Dimino, Sr., *We Have Met the Special Interests, and We Are They*, 74 MO. L. REV. 495 (2009); Roy A. Schotland, *A Plea for Reality*, 74 MO. L. REV. 507 (2009); Michael E. Solimine & Rafael Gely, *Federal and State Judicial Selection in an Interest Group Perspective*, 74 MO. L. REV. 531 (2009); Anthony Champagne, *Parties, Interest Groups, and Systemic Change*, 74 MO. L. REV. 555 (2009); and Lee Epstein, *Shedding (Empirical) Light on Judicial Selection*, 74 MO. L. REV. 563 (2009).

11. In the written symposium, these articles include Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635 (2009); Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 75 MO. L. REV. 573 (2009); G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605 (2009); and Duane Benton, *Comments on the White, Caufield, and Tarr Articles*, 74 MO. L. REV. 667 (2009).

12. These articles include Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751 (2009); Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711 (2009); Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675 (2009); Michael E. DeBow, *The Bench, the Bar, and Everyone Else: Some Questions about State Judicial Selection*, 74 MO. L. REV. 777 (2009); and Mary L. Volcansek, *Exporting the Missouri Plan: Judicial Appointment Commissions*, 74 MO. L. REV. 783 (2009).

13. O'Connor, *supra* note 8.

14. See, e.g., Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law, <http://www.law.georgetown.edu/judiciary> (last visited July 16, 2009). Prior to her appointment to the United States Supreme Court, Justice O'Connor was both elected as a judge on the Maricopa County Superior Court and appointed by Governor Bruce Babbitt to the Arizona Court of Appeals. JOAN BISKUPIC, SANDRA DAY O'CONNOR 64-68 (2005).

posium was established to honor Earl F. Nelson, a major benefactor of the University of Missouri School of Law. In addition to his ties to the law school, Mr. Nelson had an interesting tie to the development of the Missouri Nonpartisan Court Plan through his law partner Fred L. Williams.

One of the reasons people in Missouri wanted to move from an elected judiciary was to insulate judges from the vagaries of the partisan political process. In the two decades before the adoption of the Nonpartisan Court Plan in 1940, only two judges who had served a full term were re-elected to the Supreme Court of Missouri.¹⁵ One of those judges who was not re-elected was Fred L. Williams, who had this to say about his electoral experience as a judge: “I was elected in 1916 because Woodrow Wilson kept us out of war. I was defeated in 1920 because Woodrow Wilson did not keep us out of war. In both of the elections not more than five percent of the voters knew I was on the ticket.”¹⁶

After he left the Supreme Court of Missouri, Judge Williams practiced law in St. Louis with another prominent Missouri attorney – Earl F. Nelson, in whose honor the Nelson Lecture was established. The firm of Williams, Nelson & English was located in the Boatman’s Bank Building in St. Louis, which was also the building that housed the Missouri Institute for the Administration of Justice – the organization that led the fight for the Missouri Nonpartisan Court Plan in 1940.¹⁷ In addition to Earl F. Nelson’s own ties to Missouri’s Nonpartisan Court Plan, at least one former Nelson Lecturer also had significant ties to the adoption of that Plan.¹⁸

15. Robert A. Schroeder & Harry A. Hall, *Twenty-Five Years’ Experience with Merit Judicial Selection in Missouri*, 44 TEX. L. REV. 1088, 1093 (1966).

16. Stephen A. Teller, *The Selection of Judges: The Faults of the Pennsylvania Plan*, 41 A.B.A. J. 137, 141 (1955).

17. See also Letter from The Missouri Institute for the Administration of Justice to Earl F. Nelson (1940) (written on behalf of the Missouri Institute for the Administration of Justice asking Earl F. Nelson to collect signatures for the inclusion of the Missouri Nonpartisan Court Plan on the ballot, which he apparently was unable to do because of ill health). My thanks to *Missouri Law Review* Associate Editor Meghan Lewis for uncovering this history in the archives of the Missouri Western Historical Manuscript Collection at the University of Missouri library.

18. The second Nelson Lecture, in 1955, was given by Rush Hudson Limbaugh, a prominent Missouri lawyer and 1916 graduate of the School of Law. His 1955 Nelson Lecture was titled “The Public Duty of the American Lawyer.” He not only mentioned the lawyer’s duty to see that the very finest lawyers are selected as judges but also stated, “We in Missouri are proud of the fact that we have devised a system for the selection of judges that has not only attracted national attention and favorable comment, but which has also furnished for service on our courts in this State the leading men in our profession.” Rush H. Limbaugh, *The Public Duty of the American Lawyer*, 20 MO. L. REV. 223, 253 (1955). Limbaugh, in fact, served as head of the Speakers’ Division for the Missouri Institute for the Administration of Justice, which led the 1940 campaign for merit selection of judges in Missouri. Leaders of Non-Partisan Court Plan Campaign, 11 MO. B. J. 4, 59 (1940).

The statement by Justice Sandra Day O'Connor at the beginning of this introduction speaks to the need for an institutional framework to protect our judges, federal and state, from the pressures that all too often surround their decisions. The contributors to this symposium have considered the essential attributes of judicial selection and retention systems necessary to protect the "least dangerous branch"¹⁹ from such political pressures. However, when asked in her Senate confirmation hearings by Senator Patrick Leahy whether judges should reflect popular sentiment in their judging, Justice O'Connor responded: "I think judges must be prepared to act with courage."²⁰

One of the hallmarks of Justice O'Connor's own career, both on and off the bench, has been just such courage. May all judges, no matter how selected and retained, exhibit similar courage as they strive to ensure equal justice for all in our state and federal judicial systems.

19. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

20. *Nomination of Sandra Day O'Connor: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong. 103 (1981) (statement of Sandra Day O'Connor).