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# Missouri's Nonpartisan Court Plan From 1942 to 2005

*Charles B. Blackmar*\*<sup>1</sup>

## FORMULATING THE PLAN

Missouri's Constitution of 1821 provided for the appointment of all superior court judges by the governor, in the manner which prevailed in most of the states then members of the union. With the advent of Jacksonian democracy, a feeling developed that all persons holding important public positions should be elected by the voters, and most of the states opted for the popular election of trial and appellate judges.<sup>2</sup> In 1848, Missouri amended its consti-

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\* [Editor's Note: Judge Charles B. Blackmar served on the Missouri Supreme Court from 1982 to 1992. He was retained in office by the voters in November 1984 pursuant to the Missouri Nonpartisan Court Plan. Judge Blackmar graduated from Princeton University in 1942 and served in the Army for four years in Europe. He was awarded the Silver Star, Bronze Star, and Purple Heart. Judge Blackmar practiced law in Kansas City from 1948 to 1977, taught law at St. Louis University from 1966 to 1982, and served as a professional labor arbitrator throughout the Midwest from 1967 to 1982. After retiring from the Supreme Court at the state-constitutionally mandated age of 70, Judge Blackmar continued to hear cases at the trial and appellate level as a senior judge until his death on January 20, 2007, in Clearwater, Florida. He was 84. The eulogy delivered by Chief Justice Michael A. Wolff of the Supreme Court of Missouri at the funeral service on January 26, 2007, follows this article.]

1. I am a Kansas City native, and lived there from 1922 until 1966, with time out for college, military service, and law school. My father was a practicing lawyer in Kansas City from 1908 until his passing in 1961. He was active in Missouri Bar affairs and served as its president in 1947-48. I was only 16 in 1938, but followed political news closely and remember the Douglas-Billings primary race described in this text. My father was an active supporter of the 1940 amendment that established the Missouri Plan. In fact, he enlisted me to help solicit signatures on the initiative petition.

When I returned to Missouri in 1948, I followed the Missouri Plan in operation and visited with many lawyers and judges. In a recent conversation with my colleague, Professor and former Judge Joseph J. Simeone of Saint Louis University Law School, he commented that he and I have followed the operation of the Plan longer and more intensely than any other persons now living. Much has been written on the Missouri Plan, and reference is made to the most relevant publications in the bibliography which follows this text. Citations are provided where applicable, but much of the text represents my memory of past events, which I followed carefully and discussed with lawyers, judges, and colleagues over the years. I take full responsibility for all that is said in this essay.

2. RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* 7 (1969) (discussing a study of the Plan in operation, from 1942 to 1969 based pri-

tution to provide for popular election of all judges, including judges of the Supreme Court, on partisan tickets at the regular biennial elections.

Missouri continued to elect judges in this manner until 1942, when a constitutional amendment bearing the title “Nonpartisan Selection of Judges” was placed on the ballot and approved by a majority of the voters.<sup>3</sup> The amendment applied only to judges of the Supreme Court, the three regional courts of appeal, and the circuit courts in the City of St. Louis and Jackson County. In later years, the voters of St. Louis County, Clay County, and Platte County have chosen to select their circuit and associate circuit judges in the same manner.<sup>4</sup> The method of selection provided for in the 1940 amendment has been known as the “Missouri Plan.” It has been copied in whole and in part by quite a few states. In this essay it will be referred to for convenience simply as “the Plan.”

The origins of the Plan can be traced to several distinguished scholars and jurists, including Harvard Dean Roscoe Pound, Professor Albert Kales, Chief Justice and former President William Howard Taft, Herbert Harley of the American Judicature Society, and, incredibly, the future British Socialist leader Harold J. Laski.<sup>5</sup> All of these men sensed problems in the popular election of judges, such as lack of interest among voters confronted with a large number of elected offices for which to vote, the undue influence of political organizations, the necessity of campaigning by aspirants to judicial office and the attendant need for judicial candidates to raise campaign funds, with practicing lawyers the most likely targets of fundraisers. There was a general feeling that “there must be a better way” of choosing judges.

Circumstances in Missouri in the late 1930’s provided an opportunity for reform. During the 1930’s, the Pendergast organization dominated politics in Kansas City and sought to extend its influence to the rest of the state. In 1936, Lloyd Crow Stark was elected Governor. He had the support of boss Thomas J. Pendergast, but pledged to fight corruption where it appeared. Stark displeased Pendergast by appointing a Board of Election Commission-

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marily on anonymous interviews with various individuals claiming to be knowledgeable, with a minimum of weighing of the knowledge or credibility of the interviewees).

3. *Id.* at 12. The amendment was initially placed on the ballot by popular initiative in 1940, and took effect in 1942. *Id.* at 11.

4. After enabling legislation authorized a vote, voters of St. Louis County rejected a proposal to establish the Plan for its courts in 1967, possibly because the county at the time usually produced Republican majorities while the governors were Democrats. The County adopted the Plan in 1970. Clay County and Platte County adopted the Plan in 1973. The latter two counties contain parts of Kansas City. The Kansas City Charter extends the Plan to Kansas City municipal judges as well. Under the constitution, other judicial circuits may adopt the plan upon approval by a majority of voters in the circuit. See Missouri Nonpartisan Court Plan, available at [www.courts.mo.gov/page.asp?id=297](http://www.courts.mo.gov/page.asp?id=297).

5. WATSON & DOWNING, *supra* note 2, at 8-9.

ers for Kansas City. Stark also appointed James Marsh Douglas of St. Louis to fill the balance of an unexpired term on the Supreme Court of Missouri. In 1938, Judge Douglas filed for reelection to a full term, but Pendergast, primarily to assert his dominance over Stark, supported Judge James H. Billings of Kennett as Stark's primary opponent. It is fair to say that most voters of the state cast their votes for Douglas or for Billings with little attention to judicial qualifications, instead basing their choice on whether they preferred Pendergast or Stark. For example, in Jackson County, Billings received 119,603 votes to Douglas's 20,677, whereas in the City of St. Louis, which also had strong political organizations, Douglas prevailed by 149,546 to 17,113. Douglas was an easy winner in the statewide primary election with 432,244 votes to 312,746 for Billings. Douglas also won in the General Election by a substantial margin.

The 1938 primary demonstrated the deficiencies in popular election of judges, at least in urban and statewide contests. There were attempts to persuade the General Assembly to place a constitutional amendment on the ballot providing for a different method for selecting appellate and urban judges, but the legislators did not act. Concerned citizens then made use of the alternate method of amending the constitution and petitioned for an amendment on the ballot at the 1940 general election. For the most part, the sponsors were civic organizations and prominent lawyers of both major parties. After obtaining the sufficient number of signatures, the supporters saw their amendment adopted with 535,000 favorable votes over 432,244. Lawyers were divided on the proposition, but professional politicians in the cities were generally opposed because of loss of the opportunity to do favors for their supporters. The amendment carried well in St. Louis, Kansas City and in the larger counties, but a substantial majority of the counties voted against the amendment by relatively narrow margins. A circumstance favorable to its passage was the strong anti-boss sentiment resulting from the conviction of Thomas J. Pendergast on tax evasion charges in 1939 and the numerous convictions of his henchmen on vote fraud charges arising out of the 1936 general election.

The amendment as adopted provided methods for choosing judges essentially as follows:

- (1) A statewide Appellate Judicial Commission was established consisting of seven members, one judge of the Supreme Court of Missouri chosen by the judges of that Court, three lawyers, one from each of the appellate districts of the state elected by the members of the bar residing in that district, and three lay members, appointed by the Governor. The commission members other than the judicial member are chosen for terms of six years, with the terms of one member expiring each year. When a vacancy occurs on an appellate court, the commission submits a panel of three lawyers to the Governor, who appoints one of the three. The terms of all appellate judges were fixed at twelve years, and were not dependent on the terms of the judges the appointees replaced.

(2) There was established, for the Circuit Courts in the City of St. Louis and Jackson County, a circuit judicial commission of five members. The chief judge of the court of appeals for the district is the chairperson. Two members are elected by the members of the bar residing in the circuit, and two are appointed by the Governor, with terms expiring in different years. The terms of circuit judges remained at six years. For each vacancy a panel of three is certified to the Governor, who makes the selection.

(3) A judge appointed pursuant to the Plan must file for retention at the first general election following the first year of service. If retained, the judge gets a full term — twelve years for appellate judges and six years for circuit judge — and may be retained by the voters for successive terms until reaching the age of seventy. In retention elections the only issue on the judicial ballot is whether the judge shall be retained and the vote is simply “yes” or “no.” Judges who were in office at the time the Plan became effective were “grandfathered” for the balance of the terms to which they had been elected and were eligible to file for retention in the same manner as appointed judges.

(4) Judges serving under the Plan are prohibited from membership in political organizations, from making political contributions, and from campaigning for retention or soliciting funds to further their retention, but not from proclaiming adherence to a political party or voting in primary elections.<sup>6</sup>

The initial amendment required appellate judges to retire at the age of seventy-five. A subsequent amendment provided for mandatory retirement of all judges of the state at age seventy.<sup>7</sup> The initial amendment further provided that other circuits could elect to come under the Plan by popular vote. In 1951, the Supreme Court held that the constitutional provisions for the Plan’s adoption were not self-enforcing in the absence of enabling legislation.<sup>8</sup> Pursuant to legislation later adopted, St. Louis, Clay and Platte Counties have chosen to have their circuit judges and associate circuit judges appointed pursuant to the Plan.<sup>9</sup>

The general election of 1942 was significant in the history of the Plan. The election in 1942 was an “off year” election, with no presidential or gubernatorial race. Such elections often produced small voter turnouts. This was the first election at which judges stood for retention pursuant to the Plan, and the “Lauf Amendment,” calling for the total abolition of the Plan and return to partisan elections for all judges, had also been placed on the ballot by the General Assembly. Despite support from the Democratic party organizations in St. Louis and Kansas City, the amendment was soundly defeated, with

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6. See generally Laurance M. Hyde, *The Missouri Plan for Selection and Tenure of Judges*, 39 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 277 (1948) available at: [www.jstore.org/view/08852731/ap040106/04a00000/0](http://www.jstore.org/view/08852731/ap040106/04a00000/0).

7. MO. CONST. art. V, § 26 (amended 1976).

8. See *State ex rel. Millar v. Toberman*, 232 S.W.2d 904 (Mo. 1950) (en banc).

9. Your Missouri Courts, *Missouri Nonpartisan Court Plan*, <http://www.courts.mo.gov/page.asp?id=297> (last visited Apr. 17, 2007).

389,065 votes in favor of retaining the plan over 216,554 votes supporting the repeal. In later years, amendments calling for repeal of the Plan have been introduced in the legislature, but none of these has achieved the constitutional majority in both houses required to put an amendment on the ballot.

Despite the failure of the Lauf Amendment, opponents of the Plan continued efforts to nullify its effects. In 1942 delegates were chosen for a Constitutional Convention that had been previously decreed by the voters. Most of these delegates were from outstate areas, where the Plan had not been popular with political figures. A determined effort was made to submit a new constitution to the voters that would call for some form of popular election for all judges. Largely by reason of the 1942 vote, however, it was feared that a constitution which effectively abolished the Plan might be rejected by the voters, and opponents of the Plan joined with its backers in defeating attempts to draft a judicial article calling for popular election. The convention also rejected suggestions that alternative articles be submitted to the voters: one incorporating the Plan and one providing for only popular election. The Constitution of 1945 incorporated the substance of the 1940 amendment establishing the Plan and was approved by the voters of the state.<sup>10</sup>

In 1942, two Jackson County circuit judges, Marion D. Waltner and Allen C. Southern, were up for retention. Judge Waltner had been supported by the Pendergast organization in his initial candidacy for a circuit judgeship, and although by 1942 it was only a shadow of its former self, the organization went all out in support of his retention. Despite this support, which produced heavy majorities in the so-called "controlled" wards, Waltner lost his bid for retention, with 36,420 favorable votes and 42,080 negative votes. There are differing opinions as to the reason for Waltner's defeat. The *Kansas City Star*, which then published a morning edition known as the *Kansas City Times* and dominated the newspaper market in Kansas City, declared against Waltner in editorials and critical articles.<sup>11</sup> Additionally, to the writer's knowledge, quite a few lawyers were sharply critical of his performance on the bench. It is also quite possible that the Pendergast support worked against him, despite the demonstrated ability of that organization to deliver votes in certain wards. In any case, Waltner was one of only two judges to be voted out of office in retention elections during the entire history of the Plan. All others have been retained.

The Pendergast organization chose to oppose Judge Allen C. Southern, even though he had been elected with its support in the past.<sup>12</sup> Judge Southern

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10. JACK W. PELTASON, *THE MISSOURI PLAN FOR THE SELECTION OF JUDGES* 90-99 (1945) (providing a detailed and documented study of methods of judicial selection in Missouri from 1820 through 1945, culminating in the adoption of the Plan in 1942, including discussion of the first three years of the Plan in operation).

11. See *KAN. CITY STAR*, Oct. 28, 1942, at 1; *KAN. CITY STAR*, Oct. 29, 1942, at 2.

12. See *KAN. CITY STAR*, Oct. 28, 1942, at 1; *KAN. CITY STAR*, Oct. 29, 1942, at 2.

belonged to an old Jackson County family and lived in Independence, and had a reputation as a thoroughly upright judge who was well versed in the law and would never bend a ruling because of political pressure. Some of his rulings may have displeased the Pendergast organization. The voters, in spite of the organized opposition, supported his retention overwhelmingly with 56,179 votes in his favor and 17,281 against.

In the 1940 vote on the question of adopting the Plan, the great majority of the outstate counties voted in the negative. By contrast, a substantial majority of these same counties opposed the 1942 proposal for repeal. Due to this shift and the retention of then-sitting judges, it would be reasonable to conclude that in 1942 most of the voters of the state were satisfied with the Plan in operation.

### JUDICIAL APPOINTMENTS UNDER THE PLAN

The first appointments under the Plan were made by Governor Forrest C. Donnell. Elected in 1940, Donnell was the first Republican elected to that office since 1928. By 1940, almost all of the judges of the courts covered by the Plan had been elected on the Democratic ticket. It is not surprising, then, that the newly elected governor chose to appoint Republicans from all six of the panels submitted to him by the several commissions. For the first Supreme Court vacancy, he appointed Judge Laurance M. Hyde, then a Commissioner of the Supreme Court.<sup>13</sup> Judge Hyde served as a Supreme Court judge until his retirement in 1966, after which time he made himself available as a special judge, eventually completing a total of forty-five years of service on the Court. He was undoubtedly Missouri's most distinguished jurist, achieving national recognition for his participation in affairs of the American Law Institute and the American Judicature Society, and cultivating acquaintanceships with state and federal judges from all over the country.

Governor Donnell also appointed Samuel A. Dew to a vacancy on the Kansas City Court of Appeals. Judge Dew had been elected to a circuit judgeship in Jackson County on the Republican ticket in the 1920's but had lost his office, along with all other Republicans, when the Democrats took over in the

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13. Commissioners of the Supreme Court and the then St. Louis and Kansas City Courts of Appeal were authorized by legislation that was renewed from time to time. They sat with the courts they served, received the same salaries as the judges, and were customarily addressed as "judge." Commissioners prepared opinions for the consideration of the judges, but had no vote. A majority of the commissioners of any one court could not belong to the same political party. *See, e.g.*, MO. REV. STAT. § 477.083-.086 (1959). The legislature in 1971 provided that no new commissioners could be appointed, that present commissioners could be reappointed for four-year terms until reaching the age of seventy, and that they were eligible to serve as special judges on any district of the Missouri Court of Appeals. MO. REV. STAT § 477.081 (1972).

1930's. The Governor appointed former United States Attorney William Vandeventer to the Springfield Court of Appeals, and appointed Republicans to circuit judgeships in Jackson County and the City of St. Louis. Although Donnell's appointments indicated that partisan considerations had not been eliminated by the adoption of the Plan, there was apparent satisfaction with the quality of the lawyers he appointed to the bench.

For twenty-eight years after Governor Donnell left office in 1944, the governorship was the province of Democrats. The appointments during these years gave rise to the charge that the Plan was not truly nonpartisan. Some judicial commissions adopted the practice of naming two members of the governor's party and one member of the opposite party to each panel. Then-Chief Justice C.A. Leedy, in his capacity as Chairman of the Appellate Judicial Commission, once called the author's father, Charles M. Blackmar, to inquire as to whether he would be willing to be the "Republican" member of a panel for a Supreme Court vacancy, voicing the assumption that he would not be appointed. Mr. Blackmar replied that he would not be "used" in the manner the Chief Justice suggested. The proclivity of the early governors to appoint only members of their own party gave support to the charge of partisanship. It was further suggested that the well-intentioned practice of including a minority member restricted the governor's options and made it possible for the commission to have undue influence on the actual appointment. Some commissions responded by naming all three panelists from the governor's party, thus giving further support to the claims that the Plan was not truly nonpartisan.

Forrest Smith, long-time state auditor, was elected governor in 1948. Walter Bennick, a Commissioner of the then-St. Louis Court of Appeals, was a Republican.<sup>14</sup> Bennick's performance as an appellate judge was highly regarded, and some interested lawyers inquired of Governor Smith as to whether he would consider appointing him to a judicial vacancy. Smith told them that he would not appoint a Republican to a judgeship if a Democrat was on the panel submitted to him. The Appellate Judicial Commission then submitted a panel consisting of Judge Bennick and two other Republican lawyers, from which Governor Smith appointed Bennick.

Except for the Bennick appointment, all governors between 1941 and 1953 appointed members of their own party. The situation changed substantially during the second, nonconsecutive administration of Governor Phil M. Donnelly from 1953 to 1957. Donnelly had been elected in 1952 to his second term. He had been elected governor in 1944 but was ineligible for immediate reelection when that term expired. In 1954, he appointed Henry J. Westhues, a Republican Supreme Court Commissioner, to a judgeship on that Court. Judge Westhues was a classmate of Governor Donnelly's at St. Louis

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14. The empowering legislation required that commissioners of the Supreme Court and the courts of appeal be appointed in a bipartisan manner. *See* MO. REV. STAT. § 477.083-.086 (1959).



University School of Law and had a fine reputation as a legal scholar and writer.

A significant event in the history of the Plan took place in 1953 during Governor Donnelly's second term: the Missouri Legislature authorized three new judgeships in Jackson County. The Sixteenth Circuit Judicial Commission at the time consisted of Judge Nick T. Cave, presiding judge of the Kansas City Court of Appeals, two lay members appointed by the preceding governor Forrest Smith, and two lawyer members, one of whom, Charles M. Blackmar, was this author's father. The Commission considered more than fifty applicants for the three positions. In October of 1953, it submitted three panels to the governor over the dissent of Judge Cave and Commission Member Blackmar, both of whom objected to what they considered inappropriate deference to political considerations on the part of the majority of the Commission. The Governor agreed, and returned the panels to the Commission without making appointments, asserting that the arrangement of the panels demonstrated inappropriate attention to both inter- and intra-party political influence. The Commission took the position by majority vote that it had no authority to rearrange the panels, and again certified the same panels to the Governor.

This deadlock continued for many months. In July of 1954, the Supreme Court adopted a rule giving the Commission authority to rearrange the names on the panels. The majority of the Commission refused to exercise this authority, however, and in October of 1954 resubmitted the original panels, again by a 3 to 2 vote. The Governor stood his ground. The deadlock was not broken until November of 1955, when the term of lawyer Commission Member Clarence Chilcott expired. Chilcott had been elected to an unexpired term and was therefore eligible to be elected for a full term, but he was defeated by a two to one margin by David R. Hardy, a highly respected lawyer who ran on a platform of breaking the standoff. The newly constituted Commission met, rearranged the names on the three panels, and again submitted them to the Governor. The Governor expressed his regret that no new names had been submitted, but appointed two Republicans and one Democrat from the rearranged panels, despite the availability of a Democrat on each panel. Thus, the crisis was resolved.<sup>15</sup>

In 1976, a constitutional amendment was adopted providing, among other things, that if a judicial commission submitted a panel to the governor and the governor did not make an appointment within sixty days, then the Commission could make the appointment. This amendment effectively settled in favor of the Commission any question as to the governor's authority to

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15. This author followed the details of the controversy closely and frequently discussed the goings on with his father. The controversy is discussed in depth by Watson and Downing, and their report is in general accord with the writer's recollection. WATSON & DOWNING, *supra* note 2, at 100, 113-20.

reject panels. No governor to date has failed to make an appointment within the allotted time.<sup>16</sup>

Governor Donnelly's successor, James T. Blair, Jr. (1957-1961), resumed the practice of appointing only members of his own party to judge-ships. Governor John M. Dalton (1961-1965) appointed an active Republican, James M. Finch, Jr., of Cape Girardeau, to the Supreme Court. There was little public controversy about appointments under the Plan during the terms of these governors. Some observers said that the Finch appointment showed that Governor Dalton, whose home was in Kennett, would appoint a lawyer from southeast Missouri without regard to politics.

In 1964 Warren E. Hearnes was elected Governor. In 1968 he became the first governor to be elected to a second consecutive term, which had only been permitted by a constitutional amendment adopted in 1965.<sup>17</sup> The authorization of two consecutive terms had an interesting effect on the Plan in operation. When a governor could not be elected to a second consecutive term, the several judicial commissions would not contain any of that governor's appointees for the first two years of the term except in the event of a vacancy, and during the balance of the term, the governor would have only one appointment for each commission until the very end of his term. If a governor were elected to a second term, however, he or she would be able to appoint all three lay members after the first two years of the second term, and all three of the governor's appointees would serve for the first two years of the next governor's term, thus removing a balancing element of the original Plan. Governor Hearnes was not noted for bipartisanship in judicial appointments, but he did appoint Judge Robert E. Seiler, a well-qualified Republican from Joplin, to the Supreme Court.

Hearnes was succeeded in 1972 by Christopher S. Bond, the first Republican elected governor in 28 years. The majority of Governor Bond's appointments during his first term were Republicans, but it must be said that very few Republicans were serving on the courts at the time of his inauguration. Since Bond's election in 1972, the voters have divided the governorship between the two principal parties, and this circumstance has had an important effect in promoting bipartisanship on the bench.

At the 1976 primary election, the General Assembly submitted substantial amendments to Article V of the Constitution, which were adopted by Missouri voters.<sup>18</sup> These amendments effected a general simplification of the court structure in the state. The portions of the amendment of greatest importance to the Plan were as follows: (1) the substitution of associate circuit judges for magistrates, with the associates in circuits subject to the Plan nominated by the local circuit judicial commission rather than being elected

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16. See MO. CONST. art. V, § 25(a) (amended 1976).

17. MO. CONST. art. IV, § 17 (amended 1970). Governor Hearnes was the principal sponsor of this amendment.

18. MO. CONST. art. V (amended 1976).

by the voters as magistrates had been, and making associate circuit judges eligible for assignment by the presiding judge of the circuit to circuit court cases; (2) the express statement that the provisions of the amended article for adoption of the Plan by the voters in other circuits were self enforcing, rather than requiring further action by the legislature; (3) the completion of the phasing out of the commissioners of the Supreme Court and the Courts of Appeal, and their replacement by judges of the several districts as each commissioner's service terminated; and (4) the substantial expansion of the jurisdiction of the courts of appeal and resulting diminution of the mandatory jurisdiction of the Supreme Court.

The amendment also authorized the assignment of any judge to any court in the state, by Supreme Court order. Retired judges and commissioners were given the option of serving as Senior Judges, subject to assignment by the Chief Justice to any court of the state, provided that they did not practice law. The amendment did not change the basic structure of the Plan. It took effect by its terms on January 2, 1979.

During the administration of Governor Joseph Teasdale,<sup>19</sup> a Democrat, judicial appointments were also Democrats, in the manner of most past governors. Some commissions followed the practice of submitting names only of members of the governor's party, apparently being of the opinion that a panelist of the opposite party would have no reasonable expectation of appointment, and that the naming of such a panelist would restrict the governor's freedom of choice.

In 1980, Christopher Bond was elected to a second term, avenging his loss to Teasdale four years earlier. During Bond's second term, public controversy, rare to that point, arose with regard to the naming of panelists for appellate positions. From 1942 to 1981, there was little publicity about the choice of panelists and retention elections for courts subject to the Plan. Judges of the appellate courts and of the metropolitan circuit courts were invariably retained by comfortable margins. In each election there were a substantial number of "no" votes, but no demonstration of organized opposition. When several judges of the same court were up for retention in the same election, the patterns of "yes" and "no" votes for the several candidates were quite uniform.<sup>20</sup> When vacancies occurred there were simple announcements of dates for applications, often in the back pages of newspapers, and similar announcements when panels were submitted to the governor. Only the appointments usually made the front pages.

In 1982, there were three vacancies on the Supreme Court; two by resignation and one by retirement. The then-Chairman of the Appellate Judicial

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19. Teasdale was governor from 1977-1981.

20. See David Leuthold & Gregory Casey, *Voter Attitudes in the 1992 Missouri Judicial Retention Elections*, at 4 (1992) (presenting a statewide survey and exit poll conducted for the Missouri Bar, which was prepared by two political scientists at the University of Missouri).

Commission was Chief Justice Robert T. Donnelly. Some applicants for the positions made overtures to those who might help them, and politicians were active. While such maneuverings were not unusual, Chief Justice Donnelly was disturbed by the activities of members of the Supreme Court who made contact with lawyer and lay members of the Appellate Judicial Commission. He expressed the opinion that the Court customarily chose the Chief Justice as Chairman of the Commission, and that the Chief Justice acted on its behalf.<sup>21</sup> The activities of these other judges so disturbed Donnelly that he resigned as Chairman of the Commission after the first two Supreme Court panels were submitted, but he retained his post as Chief Justice. The Court then elected the judge next in line for the chief justiceship, Albert L. Rendlen, as the Chairman of the Commission. It was well known that Rendlen had been active in making contact with commissioners while Donnelly was Chief Justice.<sup>22</sup>

The Commission, under Rendlen's chairmanship, proceeded to name a panel for the remaining vacancy on the Missouri Supreme Court, and Governor Bond appointed the author, who was a classmate of Judge Rendlen's at the University of Michigan Law School. The Governor had previously appointed two appellate court judges, George F. Gunn, a Republican serving on the Eastern District, and William H. Billings, a Democrat from Kennett, who was then serving on the Southern District Court of Appeals. Judge Billings, incidentally, is the son of Judge James H. Billings, whose primary race in 1938 gave initial impetus to the effort for a new method of judicial selection.

The ensuing controversy is described in a fine article by Circuit Judge Jay A. Daugherty of Kansas City, who uses the pejorative term "scandal" in describing charges that "one sitting judge allegedly manipulated the merit plan to 'hand-pick' three new members of the court."<sup>23</sup> The author, perhaps because his appointment was one of those drawn into question, would cate-

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21. ROBERT T. DONNELLY, *A WHISTLE IN THE NIGHT* 75-77 (1938) (providing a brief autobiography describing Judge Donnelly's military service and his long service on the Supreme Court of Missouri).

22. There is, furthermore, no reason why a Judge of the Supreme Court does not have the same right that any other citizen has of approaching commission members on behalf of particular aspirants.

23. Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 328 (1997). This article adopts the term "scandal" from an article written by Gregory Casey. See Gregory Casey, "Public Perception of Judicial Scandal: The Missouri Supreme Court: 1982-1988," 13 JUST. SYS. J. 284-85 (1989) (taking strong exception to the use of the pejorative term "scandal" in describing what at the most was a difference of opinion between two judges as to the propriety of approaches to the members of a judicial commission, of which the challenged judge was not a member). Jay A. Daugherty is a Circuit Judge in Kansas City. He has surveyed the history of the Plan from its inception to 1997, expressed concern about the diminishing majorities in retention elections (which have improved in years following his cutoff date) and made valuable suggestions for improvement of the Plan.

gorically reject any suggestion that scandal was involved. The controversy, indeed, was generated by a partisan political leader whose candidate was not selected by the Commission for submission to the governor.<sup>24</sup> As further evidence of partisan influences on the selection of panels, Judge Daugherty also cited a panel submitted to Bond's successor, Governor John Ashcroft, in 1985 which contained the name of Governor Ashcroft's chief of staff. Judge Daugherty points to the complaints about panels and appointments from 1981 through 1985 as responsible for the lower percentage of favorable votes received by judges who were candidates in later retention elections.

With respect, this author questions Judge Daugherty's suggestions about the reasons for the decline in favorable retention votes. Judges Gunn, Billings, and the author were on the retention ballot in 1984 after the political controversies had been freely aired, and each was retained by a substantial margin. Nor did any controversies over Ashcroft's appointment of his chief of staff seem to hurt the favorable retention vote for his appointee in 1986. It seems doubtful that voters who were not swayed in the 1984 and 1986 retention voting based their later votes on the earlier controversies. The Leuthold-Casey study commissioned by the Missouri Bar to explore reasons for the decline in retention percentages for judges in the years following 1986 points to a general lack of confidence on the part of the voters in government in general, as evidenced by lowered success in candidates running for reelection for other offices.<sup>25</sup> As will be pointed out later, retention percentages for judges have increased in elections since 2000.

One important circumstance of the early 1990's that may have changed the pattern of retention votes is the complete reconstitution of the Supreme Court. When this author became the newest member of the Supreme Court in December of 1982, all of the judges then serving were of approximately the same age, having served actively in World War II. Within the next ten years, consequently, a completely new Court had to be appointed. Republican Governor John Ashcroft was elected in 1984 and reelected in 1988, resulting in his ability to appoint all of the lay members of the Appellate Judicial Commission, with a chairman whom he had previously appointed to the Court. His appointees were all well qualified lawyers, with several having been appeals judges, but the situation demonstrated the potential for political maneuvering when a majority of the Commission consists of appointees of the sitting governor.

The political situation took a new turn in the 1990's when three of the appointees of Governor Ashcroft resigned from the Court to enter private practice, while a fourth suffered a tragic premature death. All were replaced by appointees of Democratic governors. Governor Mel Carnahan appointed Judge Ronnie White, whom he had previously appointed to the Eastern Dis-

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24. See Terry Ganey, *Robert T. Donnelly, Former Missouri Chief Justice* ST. LOUIS POST-DISPATCH, D12, June 18, 1999.

25. Leuthold & Casey, *supra* note 20, at 1, 5, 9.

trict of the Court of Appeals, to the first vacancy on the Supreme Court. Judge White is the first African-American Judge in the history of the Supreme Court. Carnahan next appointed Michael A. Wolff, a law professor and legal author who had worked closely with him.

Carnahan's successor, Democratic Governor Bob Holden, appointed Judge Laura Denvir Stith of the Western District as his first Supreme Court appointment, and Judge Richard Teitelman from the Eastern District as his second. With the appointment of Judge Teitelman, Ashcroft appointees no longer constituted a majority on the Supreme Court. Judge Duane Benton accepted an appointment to the United States Court of Appeals for the Eighth Circuit, and Governor Holden appointed Judge Mary Rhodes Russell of the Eastern District to the resulting vacancy. As of September of 2005, the Court consisted of two appointees of Governor Ashcroft, two of Governor Carnahan, and three of Governor Holden. The terms of Judges W. Ray Price and Stephen N. Limbaugh, Jr. expired in 2006, and Judge Russell was on the ballot in 2006 for her first retention election. All three of these judges were retained in the November 2006 election.

#### JUDICIAL RETENTION UNDER THE PLAN

In the initial election under the Plan in 1942, several judges who had been elected in partisan elections were on the ballot for retention. Most had no organized opposition, but, as has been discussed earlier, Marion D. Waltner, a circuit judge in Jackson County, was defeated for retention in an election which was well publicized locally.<sup>26</sup> In the contest for adoption of the Plan, much had been made of the situation of Eugene Padberg, a Circuit Judge in the City of St. Louis, who had never practiced law and was principally employed as a pharmacist. Despite running substantially behind other judges from the same circuit who were up for retention, Judge Padberg was retained by a comfortable majority in the 1944 general election. From 1944 to the early 1990's all appellate and circuit court judges who came under the plan were retained with little public discussion. Judge Daugherty pointed to the declining margins for Supreme Court and Court of Appeals judges in retention elections between 1988 and 1994,<sup>27</sup> but the margins in later elections for these positions showed higher favorable majorities.<sup>28</sup>

In 1992, Circuit Judge John R. Hutcherson of the Clay County Circuit Court was denied retention by vote of 28,740 to 30,264 against. He had served three terms as Associate Circuit Judge and had been retained each time, most recently in 1990 by a margin of only 413 votes. In December of 1990 he was appointed Circuit Judge by Governor Ashcroft. At the 1992

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26. See PELTASON, *supra* note 10, at 81, 83.

27. Daugherty, *supra* note 23, at 320-22.

28. Leuthold & Casey, *supra* note 20, at 14-16.

election his judicial colleague, Michael J. Maloney, was retained by a margin of more than 18,000 votes. Judge Hutcherson's defeat can best be explained by the overwhelming vote against him in the bar poll.<sup>29</sup> There was little indication of organized campaigning or of substantial expenditures of money in this campaign.

In 2002 former Associate Circuit Judge Ralph Voss of Osage County, who publishes a newspaper in Linn, Missouri, came out in opposition to the retention of the most recent appointee to the Missouri Supreme Court, Judge Laura Denvir Stith, and of several judges of the courts of appeal running for retention. He circulated op-ed pieces to numerous rural Missouri newspapers, calling for "no" votes on the retention of Judge Stith and the other appellate judges he opposed. He focused primarily on a speech Judge Stith had made in which she asserted that the Missouri judicial system was in good order, while he had voiced vigorous criticism of several features.<sup>30</sup> Despite his efforts, Judge Stith was retained by a favorable vote of sixty-nine percent, carrying every county except Judge Voss's home county of Osage.<sup>31</sup>

The 2004 general election saw an unprecedented attempt to defeat a sitting judge of the Supreme Court, with the expenditure of a substantial amount of money. Richard B. Teitelman, who had been appointed to the Supreme Court by Governor Holden in 2002, was on the ballot for retention in 2004. Most of his legal career had been spent as Director of the Legal Services Corporation of Eastern Missouri. He was the first Jewish person to serve on the Supreme Court, and was legally blind. Beginning in the fall of 2004, several weeks before the November election, there were vicious attacks on Judge Teitelman from several quarters.<sup>32</sup> The opposition included the prospective speaker of the House of Representatives, a prosecuting attorney of one of the larger counties who complained about delay in setting execution dates, the veteran political agitator Phyllis Schlafly, recently moved from Illinois back to Missouri, and the same Judge Voss who had been active in the 2002 election. Voss is shown on some mailings as the treasurer of a committee formed to attack "liberal activist" judges. Schlafly recorded a telephone message

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29. William C. Lhotka & Tim Bryant, *Missouri Judge Voted Out for 1st Time in 50 Years*, ST. LOUIS POST-DISPATCH, Nov. 5, 1992, at 6C; see also Daugherty, *supra* note 23, at 326 (referring to survey results indicating that one-third of the voters were influenced by the bar ratings).

30. See Shashank Bengali, *Retired Judge Pushes for Court Reform*, KAN. CITY STAR, Oct. 22, 2002, at B1.

31. Election Night Reporting, Nonpartisan Judges - Missouri Supreme Court, <http://www.sos.mo.gov/enrweb/raceresults.asp?eid=87&oid=24720&arc=1> (last visited Apr. 17, 2007).

32. See, e.g., William C. Lhotka, *Missouri Supreme Court Judge Faces Ouster Effort*, ST. LOUIS POST-DISPATCH, Oct. 27, 2004, at D01. A file is maintained in the library of the Supreme Court of Missouri containing clippings, newspaper articles, and handouts relating to Judge Teitelman's retention election.

which was transmitted over many telephones in the state.<sup>33</sup> These opponents used political smear tactics similar to those used all too frequently in political elections.

Critics blamed Judge Teitelman for opinions he wrote, without mentioning that these opinions were assigned to him in rotation and received the support of a majority of the Court. His vote to uphold the governor's authority to designate the date of the August primary for voting on an anti-gay marriage amendment, rather than simply allowing the proposition to go on the general election ballot by default, was converted into support of gay marriage, even though the August vote was strongly in favor of the amendment.<sup>34</sup> A separate opinion holding that a law requiring sheriffs to issue permits to carry concealed weapons without providing the means for financing the attendant expense violated the Hancock Amendment was characterized as "anti-gun," thereby drawing the opposition of the National Rifle Association to Teitelman's retention.<sup>35</sup> He was blamed for the Court's delay in setting execution dates for defendants sentenced to death, even though dates are customarily set by the Chief Justice after all appeals and post-conviction remedies have been exhausted. He was also sharply criticized by a physicians' group and others for an opinion in a malpractice case which he authored while serving on the Court of Appeals for the Eastern District, even though the Court of Appeals adopted his opinion without dissent and the Supreme Court, then containing a majority of Ashcroft appointees, declined an application for transfer.<sup>36</sup>

Teitelman's opponents used the familiar political strategy of sowing random charges without attention to accuracy. The problem was particularly difficult because judges of courts that come under the plan are prohibited by the express terms of the constitutional article from responding to the charges and have to depend on others to plead for them. It is particularly unfortunate that a candidate for governor, soon to be elected, used the term "renegade" in speaking of Judge Teitelman.

There were also some charges by legislators, some going to the point of asserting that the Plan itself was fundamentally unsound and in need of substantial modification. A variety of cures were suggested by some legislators, including Senate confirmation of appointments, requiring a supermajority of sixty percent or two thirds for retention, modification of the method for selecting lay members of the judicial commissions, and return to popular elec-

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33. See, e.g., Tim Hoover, *Conservative Groups Take Aim at Missouri Judge*, KAN. CITY STAR, Oct. 28, 2004, at B3.

34. *State ex rel. Nixon v. Blunt*, 135 S.W.3d 416 (Mo. 2004) (en banc) (per curiam) (6-1 decision).

35. *Brooks v. State*, 128 S.W.3d 844 (Mo. 2004) (en banc) (Teitelman, J., concurring with dissent of White, C.J.).

36. *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo. App. E.D. 2002) (opinion by Teitelman, J. with one judge concurring and one concurring in result) (An application for transfer to the Supreme Court was denied).



tions for judgeships. The terms “liberal” and “activist” were freely thrown about. Some criticisms had a distinctly partisan tinge.

An organization known as “Missouri Family Network” published recommendations not only on Judge Teitelman but also for ten appeals judges and thirty-one judges of the circuit courts subject to the Plan. The names of the appointing governors for each judge were prominently stated in handouts. For all of the appointees of Republican governors, retention was recommended, whereas for every judge appointed by a Democratic governor a vote against retention was urged. The handout stated that “Democrat Governors Carnahan and Holden maintained a mandatory ‘pro-abortion’ litmus test for all their judicial nominees over the past twelve years!” Several appointees of these governors told this writer that the Governor never asked them about their views on abortion and that they have made no public announcement of these views. In the writer’s nine-plus active years on the Supreme Court and more than fifteen years of active service as a Senior Judge, he does not recall any case he heard which involved abortion issues.

The semi-organized challenge to Judge Teitelman came relatively late in the campaign — less than three weeks before election day — and took many people by surprise. However, Judge Teitelman did not lack defenders. During his years with the Legal Services organization he was so highly respected by his fellow lawyers that he was elected to important offices in the Bar Association of Metropolitan St. Louis, and would have been president of that organization had he not been appointed to the Supreme Court.<sup>37</sup> The Missouri Bar poll of all lawyers of the state showed that over 80 percent of those voting favored his retention. The major metropolitan dailies endorsed him enthusiastically in editorials, and covered the news of campaigns, pro and con, extensively.<sup>38</sup>

When the ballots were counted, Judge Teitelman was retained with a favorable vote of 62.3 percent — a larger favorable vote than some Supreme Court judges had received in recent years, but less than the 69 percent of the favorable vote for Supreme Court judges in retention elections in 2000 and 2002. He carried every county in the state except Barton, which was the home of a state representative who had been particularly outspoken in criticism of Teitelman and other judges. Even in Osage County, the home of former Judge Voss, the opponents of Judge Teitelman were unable to muster a majority vote against him.

Teitelman’s successful retention vote was undoubtedly helped by a nasty campaign for election to a vacancy on the Supreme Court of Illinois, in which the rival candidates, each running on a partisan ticket, spent more than

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37. Ironically, some of his opponents tried to turn this service against him by attacking the Legal Services Corporation itself and the work it did.

38. See, e.g., Ann K. Covington, *Attacks on Teitelman are Off Base*, ST. LOUIS POST-DISPATCH, Nov. 1, 2004, at B07; *Keep Top Missouri Judges*, KAN. CITY STAR, Oct. 26, 2004, at B6.

a million dollars. In that campaign, the winner's contributions came primarily from insurance companies, other businesses, and physicians while the losing candidate received heavy contributions from trial lawyers and organized labor. This race was highly publicized in the *St. Louis Post-Dispatch*,<sup>39</sup> which endorsed the winning candidate, who ran on the Republican ticket. It is reasonable to assume that many Missourians were turned off by the excesses of this campaign and concluded that the Missouri method of selection is superior.

It is possible, however, that anti-judge ads in the metropolitan press relating to the Illinois campaign had a spillover effect on Missouri races. Judges running for retention for the Eastern District of the Court of Appeals showed a downward trend as compared to appeals judges on the ballot in the other two districts, and circuit judges in St. Louis and St. Louis County showed a similar decline. The totals show that Teitelman received more "yes" votes and more "no" votes than had been received in any previous judicial retention election in Missouri, which would seem to indicate that the widespread publicity about judicial elections induced greater interest and participation in retention elections than had been the case in the past.

Some legislators continued the battle when the new General Assembly met in January of 2005. By the time this assembly met, the term limits decreed by the voters in 1992 had taken full effect, with the result that many veteran legislators were no longer able to serve, and their replacements were wholly without experience. There was a strong "anti-judge" sentiment in both houses, undoubtedly stirred by criticism of judges in the 2004 national campaigns, with some legislators making sharp attacks on the Plan. Some legislators even talked of impeachment of "renegade" judges. A variety of amendments were proposed, including requiring senate confirmation of judicial appointment, shorter terms for appellate judges, requiring a supermajority in retention votes, and return to partisan popular election for judges.<sup>40</sup> None of these amendments made it out of the legislature. In fact, most died in the judiciary committees of the House or the Senate, with both committees chaired by knowledgeable lawyers. One amendment reached the House floor by peti-

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39. See Paul Hampel, *Money Flows into Judicial Race*, ST. LOUIS POST-DISPATCH, Oct. 26, 2004, at A01.

40. H.R.J. Res. 23, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005) (proposing modifications of the procedure for impeachment of judges, was taken out of Committee and to the floor by petition, but was not voted on prior to adjournment); H.R.J. Res. 10, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005) (calling for Senate confirmation of Supreme Court appointments); H.R.J. Res. 11, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005) (requiring Senate confirmation of all appellate judges); S.J. Res. 16, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005), (limiting terms of Supreme Court judges to five years and requiring a two-thirds vote for retention); and S.J. Res. 18, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005) (eliminating Supreme Court jurisdiction over school funding matters, were not reported out of committee before the session ended).

tion but went no further. Renewals of the amendment battle may be expected in subsequent legislative sessions, but they face a long road to submission. Perhaps the election of Republican Governor Matt Blunt in 2004, with his attendant authority to appoint lay commission members, and judges from among those submitted by the several commissions, will mitigate some of the criticisms of the Plan in years to come.

### THE FUTURE OF THE PLAN

The Missouri Plan, then, is alive, well, and resilient. Judge Teitelman's favorable vote in the face of viciously and irresponsibly unprecedented opposition is a milestone. A blue ribbon committee of the Missouri Bar was formed to consider how, in view of the judge's inability to respond to inaccurate and intemperate attacks personally, the Missouri Bar and lawyers individually should respond such attacks against a judge who is on the retention ballot. The report recognizes the responsibility of knowledgeable lawyers and bar associations to make public response to unfounded and calumnious charges.<sup>41</sup>

Judge Jay Daugherty also makes suggestions for modifications of the Plan, which have substantial merit.<sup>42</sup> Some of these modifications could be accomplished by a Supreme Court rule, and this avenue should be explored, but others would require constitutional amendment. It is doubtful that a proposed amendment would make its way out of the legislature without being loaded with disabling modifications. A proposed amendment could be placed on the ballot by means of signatures of voters, but the collection of signatures requires an enthusiasm which is difficult to muster. This writer doubts that significant amendments will be adopted in the foreseeable future. The experience of years has shown general support of the Plan. Versions of the Plan, moreover, have been widely adopted in other jurisdictions.

Some critics of the Plan argue that the label "nonpartisan" is a misnomer, and that partisanship has always played a substantial role in the selection of Missouri judges. These claims have some basis. The Governor is the appointing authority and appoints the lay members of the several judicial commissions. Governors are elected on partisan tickets. They have friends and

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41. REPORT OF MISSOURI BAR COMMISSION ON THE IMPARTIALITY OF THE JUDICIARY, at 3, *available at* [http://www.mobar.org/courts/commission\\_report.pdf](http://www.mobar.org/courts/commission_report.pdf).

42. Daugherty, *supra* note 23, at 341. Judge Daugherty considers the most significant of his recommendations that which would enlarge and restructure the several judicial commissions, which would require constitutional amendment. Proposed ethics rules could be proclaimed by the Supreme Court under its rulemaking authority. Individual commissions could adopt their own procedures for such matters as open interviews.

The balance of the judge's suggestions could be accomplished by The Missouri Bar and by local bar organizations.

supporters who may aspire to judicial positions, and may not be expected to look with a friendly eye on those who have opposed them. But there are balancing considerations. The governor is confined in his choice to nominees selected by the judicial commissions. In most instances a majority of the lay commissioners will not be the appointees of the incumbent governor. The possibility of intrigue among commission members cannot be denied, but the diverse backgrounds of the commission members serve to check excesses on their part. The disposition of voters to rotate the principal state offices between the two major parties, which has become common in recent years, also introduces a balancing factor into the equation.

It is clear that, under the Plan, able lawyers have made themselves available for judicial service who would not or could not run for elective judgeships. Nor do aspirants need to raise money for campaign expenditures, with the attendant pressure on lawyers, businesses, and organizations which are frequently involved with the legal system. A substantial problem, by contrast, is the discrepancy between judicial compensation and the substantial earnings that lawyers may make in private practice. The prospective judge may wonder whether he or she can afford to accept a judgeship, with fairness to self and family. States are pressed for funds for many important projects, and, if Missouri is an example, are often unsympathetic to judges' needs.

Missouri, under its unique contribution, has an able and functioning judiciary. The burden is on those who challenge the Plan to come up with a method which is both better and practicable.

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