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THE MISSOURI PLAN FOR SELECTION AND
TENURE OF JUDGES

Laurance M. Hyde

The author is a judge of the Supreme Court of Missouri. On December 30, 1942, he was appointed to the court and in 1944 was elected for a ten-year term under the plan described in this article. Earlier, in 1931, 1935 and 1939, respectively, he had been appointed member of the State Supreme Court Commission of Appeals.

Judge Hyde is active in the American Law Institute, the Academy of Political Science and the Conference of Judicial Councils. He aided in instituting the Missouri plan.—EDITOR.

The founders of this nation considered judicial independence essential to the preservation of our form of government. They believed, as stated in the Federalist papers, that "independence of judges is equally requisite to guard the Constitution and the rights of individuals." John Marshall stated his belief "that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary." It is significant that the great Chief Justice placed these three things in the same category. Certainly the foundation of our whole legal system must be the respect of our people for the law and this must depend mainly upon confidence in the independence, ability and integrity of the judges who apply it. Requiring judges to run on party tickets with other candidates who are partisans of the political party supporting them is surely not the ideal way to create such confidence. There must be no partisanship in the administration of justice and there should be none in the selection and tenure of judges.

Unquestionably the trend, which began more than a century ago, toward requiring all public offices to be filled by popular elections, resulted in the impairment of judicial independence and lowered the standing of the judiciary in our state governments. The distinction between judicial office and offices in the policy making branches of the government was not at first appreciated and the results of requiring judges to be politicians in order to remain judges were not at once realized. However, an impartial observer, James Bryce, in his great book "The American Commonwealth" written in 1889, commented:

"Any one of the phenomena I have described—popular elections, short terms, and small salaries—would be sufficient to lower the char-

acter of the judiciary. Popular elections throw the choice into the hands of political parties, that is to say, of knots of wire-pullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance. Short terms oblige the judge to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence.”

Bryce recognized that many American judges were able to rise above these handicaps but stated that they did so in spite of the influences of this system of selection and tenure, not because of it.

Certainly, under the political party primary and election system, judges cannot hope to make judicial work a life career. This is especially true in states closely divided politically and results in a great waste of judicial talent by turning judges out of office about as soon as they have begun to learn how to do the job well. This was well illustrated by recent experience in Missouri, where, in the twenty years between the first and second World Wars (1919 to 1939), only twice (1922 and 1936) was a judge of the Supreme Court of Missouri, who had served a full term, reelected to another term. The ten elections during this period all turned on national party issues. One able former member of our Supreme Court said that he was elected to be a judge in 1916 because Woodrow Wilson had kept us out of war; and that he was retired from office in 1920 because he had not. Judges, the same as persons in other positions requiring special knowledge and training, should improve with experience in doing their work. Surely, it is not conducive to obtaining the best possible judicial service for the state, to replace judges as soon as they have had sufficient experience to learn how to do their work well. Moreover, even when a judge is re-elected much time has been lost from judicial work by participation in long primary and general election campaigns. This is one factor that has made it difficult for many courts to keep up with their dockets. The Missouri Supreme Court got its docket on a current basis for the first time in fifty years after the State adopted the court plan hereinafter described.

Details of the Plan

In 1940 Missouri changed from a political party primary and election system to a non partisan system for its judiciary, which combines the best features of both the appointive and elective systems but provides safeguards lacking in either of these systems. This was accomplished by a Constitutional Amendment

proposed and submitted on initiative petition, sponsored by the Missouri Bar Association. It applies to the Missouri Supreme Court with seven judges, the three Courts of Appeals with three judges each, and the Circuit Courts (trial courts) of our two largest cities. There are eighteen circuit judges in St. Louis and ten in Kansas City. It also applies to the Probate Judges of St. Louis and Kansas City and to the Court of Criminal Correction in St. Louis. As to all other trial courts (circuit courts) of the state, it is optional with the voters of any circuit to adopt it in a local option election if they so desire. No judge, under the plan, may make any contribution to a political party or hold any office in it or take part in any political campaign.

Under this plan, selection is made by the Governor's appointment, but this must be from a list of three names submitted to him by a Selection Commission. The Selection Commission, for the Appellate Courts (the Supreme Court and three Courts of Appeals), is composed of the Chief Justice of the Supreme Court as Chairman, three lawyers elected by the Bar, and three laymen appointed by the Governor. The members, other than the Chief Justice, have six-year terms, staggered so that one term expires at the end of each year. These members are not eligible to succeed themselves. The lay members are appointed by the Governor, one every two years, each from a different court of appeals district. The lawyer members are elected, one every two years, by the members of the Bar of the court of appeals district which they represent. The ballots for the election of lawyer members are sent out by mail by the clerk of each court of appeals, and returned to him to be canvassed by the judges or lawyers appointed by them. The Selection Commissions for the city trial courts have five members. They are, the Presiding Judge of the court of appeals of the district in which the city is located, as chairman, two laymen appointed by the Governor, and two lawyers elected by the Bar. They also have six-year terms which are staggered so that the term of each member expires in a different year. Members of these commissions are limited to one term, and no Governor can appoint all of the lay members of these commissions, because our Governor has a four-year term and cannot succeed himself. The members of these commissions cannot hold any public office nor any official position in a political party.

The next step, after a judge has been appointed from the list submitted, is that when he has served one year, the people vote at the next general election, following such year of service, upon the question of whether or not this judge shall have a full regu-

lar term (trial courts, six years; appellate courts, twelve years). Thereafter, a judge given a full term must submit his declaration of desire for another term, at the expiration of his term, and be voted on by the people. Likewise, all judges in office at the time the amendment was adopted were required to be voted on by the people, when their terms expired, to get another term. At all such elections, the judge's names are placed on a separate judicial ballot, without party designation, the only question submitted being: "Shall Judge, of the Court, be retained in office? Yes. No." Voting is by scratching one answer and leaving the other. Thus the judge has no opponent, and runs against no political party, or national political policy, but only on his record of service on the bench. Unless that record is corrupt or obviously inefficient, there is every reason to expect that he would receive a favorable vote. Nevertheless, the voters may, if they desire, dispense with the services of a judge who they believe has proven himself dispensable. They have already done so in one instance in an election under this plan.

Adoption of the Plan

The adoption and retention of this plan was not easy. When it was first proposed everyone said it had no chance of adoption. Even its most hopeful sponsors thought they were beginning a campaign of education which would require several submissions before adoption. To the surprise of all, the amendment was adopted in 1940 by a majority of 90,000 votes. Its opponents said that the people did not understand it, and were able to get a resolution for its resubmission adopted by the 1941 Legislature. However, in the election of 1942, on resubmission, it was retained by a majority of about 180,000 votes. This was an effective demonstration that the people did understand the plan and that they also understood the political opposition to it. There was still another test when the plan had to run the gantlet of further opposition in our Constitutional Convention of 1943-44 but its popularity with the people was then too great. It became a part of our new Constitution, adopted by the people in 1945, without change except to place more judges under it, the St. Louis Court of Criminal Correction then being added to the courts under the plan.

The campaigns for this plan succeeded because they were not merely lawyers' efforts. The plan was proposed by the Missouri Institute for the Administration of Justice, an educational corporation with one-third of its membership lawyers and two-thirds laymen. Its organization was sponsored by the Missouri

Bar Association for the purpose of enlisting lay support for proposals to improve the administration of justice endorsed by the Association. The original 1940 campaign for the Court Plan Amendment was directed by the Institute, as was the 1942 campaign to retain it. It had an active organization, with a county chairman in every county in the state. It also had the support of many civic, labor, farm and industrial organizations. Many laymen made effective speakers in these campaigns. Groups of women workers did remarkable work in arousing interest and getting out the favorable vote. These campaigns also served the useful and important purpose of getting laymen interested in the courts and ready to cooperate in their improvement. All of the leading newspapers of the state gave the plan helpful support in both campaigns and in the Constitutional Convention.

Operation of the Plan

This is the eighth year of the operation of the plan. During that time five appellate court judges have been appointed under it, two to the Supreme Court, two to the Springfield Court of Appeals and one to the Kansas City Court of Appeals. There have also been five circuit court judges appointed, three in Jackson County (Kansas City) and two in St. Louis. The Probate Judge of Jackson County has likewise been appointed under the plan. In every case, in which the people have voted on these appointments, they have overwhelmingly ratified them. They have done so in the case of eight of these appointments. Another one will be voted on this November and the other two (having been made in 1948) will not come up until November, 1950. In no case, have the newspapers of Kansas City and St. Louis criticized any of these appointments but, on the contrary, they have commended not only the appointments but also the high quality of all those named by the Selection Commissions on all of the lists submitted to the Governors for their choice.

There have already been three elections under the plan, 1942, 1944 and 1946. These have completely demonstrated the non partisan feature of tenure under the plan. In 1942, when the state went Republican, two judges of the Supreme Court, both of whom had been originally elected under the old system on the Democratic ticket, received a favorable vote of about two to one for another term. In this same election, there were two Circuit Judges, both Democrats, voted on in Jackson County (Kansas City), one of whom received a favorable vote of more than three to one, while the other was rejected by an unfavorable majority of about 6000 votes. In the City of St. Louis, which went Repub-

lican for State and City candidates, six circuit judges, who had been elected under the old system on the Democratic ticket, all received favorable majorities for retention of two to one or better. Likewise, another Circuit Judge, who had formerly been elected on the Republican ticket and defeated in the Democratic landslide of 1932, was retained by a vote of more than three to one. He was the first man appointed to any court under the plan.

In 1944, the state went Democratic, but two judges of the Supreme Court, one a Republican, and one a Democrat, were given a favorable vote for another term of about three to one. In this election, there was one Court of Appeals Judge, in the Springfield District, a Republican, who was retained by a favorable vote of two to one; and one Court of Appeals Judge, a Democrat, in the St. Louis District, who was retained by a favorable vote of four to one. In Jackson County (Kansas City), which went Democratic on State and County candidates, there were seven Circuit Judges, six of whom were Democrats and one Republican. The Republican received the greatest favorable vote almost five and one-third to one, five of the Democrats received near or better than five to one, while one Democrat received a little less than four to one. The Probate Judge, a Republican, received a favorable vote of almost five to one in the same election, and received the fewest "no" votes of any of the judges.

In 1946, the state went Republican. There was no state-wide vote under the plan because there was no Judge of the Supreme Court seeking another term. There were two Court of Appeals Judges, both Republicans, one in the Springfield District and one in the Kansas City District, to be voted on. Each received a favorable vote of not quite two to one. In Jackson County (Kansas City), in which some Republican County candidates were elected, three circuit judges, all Democrats, received a favorable vote of three to one or better. In the City of St. Louis, which went Republican on United States Senator and City candidates, ten Circuit Judges, all Democrats, received favorable majorities ranging from almost five to one for the highest to a little less than two to one for the lowest. However, seven of the ten received better than four to one and another received more than three to one. There was considerable lawyer opposition to the other two, which was given some publicity in the press but there was no organized effort against them.

Thus it is clear that the elections under the plan are truly non partisan and that issues between political parties are no longer decisive of the tenure of judges in Missouri, who are under the plan. Favorable majorities have run higher in the two large

cities than in rural counties. This is, no doubt, because of the considerable publicity given to the plan, and elections under it, by the city newspapers, which has caused city voters to have more information about the plan and about judges on the judicial ballot. Furthermore, City Bar Associations have taken polls of the lawyers on local judicial candidates and the endorsement of the Bar has been given great publicity and has been very persuasive with the voters.

Future of the Plan

Of course, no plan is perfect and this plan will not automatically select good judges. The greatest danger is indifference. The Bar must be vigilant to see that lawyers with high ideals are elected to the Selection Commissions and that the people are informed about the judges who seek to be retained in office. The voters are intensely interested in candidates for such offices as Governor or Senator who go about the state appearing before large crowds discussing their views concerning vital governmental policies. Judges cannot do this and voters forget about them. This was clearly illustrated in the 1946 election. In the Springfield Court of Appeals District, the total vote on the judge of that court who was voted on for retention in office was 115,586, while the total vote in that District on the candidates for United States Senator was 224,298. Likewise, in the Kansas City Court of Appeals District the total vote on the Judge of that Court was 224,875, while the total vote on United States Senator was 426,816. Thus it is apparent that if only about half of the voters, who participate in the election, vote the judicial ballot, it might be possible for an organized disgruntled minority to defeat a judge, even though he had made a good record; or an unfit judge might be continued in office because his record was not known.

The Missouri Bar (now integrated and all inclusive) has recognized its responsibility to see that this does not occur. At a recent meeting of the Board of Governors, it has been decided that the Bar must act to see that the people of the state understand the plan, have information about the judges to be voted on, and actually participate in the election by voting the judicial ballot. A comprehensive program has been adopted for this purpose. This is to take a poll of the Bar upon the question of whether the judges, whose terms expire in 1948, and in subsequent years, or who have been appointed since the last election, should be retained in office. On Judges of the Supreme Court, this poll will be taken of all the lawyers in the state. On Court of Appeals Judges and Circuit Judges, the poll will be of all lawyers of the District or Circuit. If the result is favorable, the Judge will have

the endorsement of the Bar. This will be given publicity not only by announcement to the press but also by newspaper advertising by the Missouri Bar and by radio time. An unfavorable result would be given like publicity.

In addition to all other means for publishing the results of judicial polls taken, the President of the Missouri Bar will appoint a separate committee of lawyers in each judicial circuit of the State, whose duty it will be to thoroughly acquaint the residents of such circuit with the results of all polls taken by the Missouri Bar and to prevail upon all citizens in such circuit to vote on the separate judicial ballot and to follow the recommendations of the Missouri Bar respecting those judicial candidates; to urge the various county or city newspapers to publish the separate judicial ballot; and further to persuade the local election officials to issue the separate judicial ballot to each voter at the polls. In appointing such committees every effort is to be made to see that the personnel thereof is bi-partisan.

If this practice becomes well established so that the people will look to and follow the endorsement of the Bar, a long step will have been taken toward safeguarding the effective and beneficial operation of the plan. Many representative laymen have made known their desire for such information and the leading newspapers will cooperate in giving publicity to the results of these polls. The adoption of our court plan by the people demonstrated that they had great confidence in our lawyers because of the prominent part it gives them in the selection of judges. It will require a high degree of unselfishness and devotion to duty, on the part of lawyers, to make the plan work as its sponsors hope and believe it should; but the members of the Bar can have the kind of judges they want if they measure up to the trust the people have imposed in them.

Developments Since the Adoption of the Plan

The success of this Constitutional Amendment for improved selection and tenure of judges, caused the leaders of our Bar and other public spirited citizens to be hopeful that we could obtain similar improvements throughout our entire state government. Our Constitution had been adopted in 1875 and contained many hampering restrictions which prevented desired improvements, and would not permit some much needed modern functions of government. An attempt to modernize this Constitution had been defeated in 1924, when the people turned down a proposed moderate revision prepared after more than a year's work by a Constitutional Convention. In 1942 a committee was organized,

composed of representative men and women from all branches of civic and business activity, to sponsor a call for a new Constitutional Convention. Opponents argued that no revision should be attempted until after the war. (Most of them did not want it then.) Its supporters pointed out that many of the original thirteen states had adopted their constitutions during the Revolutionary War period when enemy soldiers were on their soil. The people voted to call a convention.

Our Constitutional Convention met in September, 1943. The committee which had sponsored the call obtained cooperation of the law schools and political science departments of our four Universities to do research work before and during the Convention. The delegates were elected in the spring of 1943 and, at the suggestion of many of them, a joint committee of the Missouri Bar Association and the Missouri Judicial Conference worked throughout the summer of 1943 on the Judicial Article. When the Convention met much helpful information had been assembled for their use. These joint committees submitted to the Convention's Committee on the Judicial Department, a complete plan for revision of the Judicial Article. Other plans and proposals were also offered. The Convention's committees held public hearings weekly during its first five or six months, and the various articles were gradually worked out, and reported to the Convention. One notable fact about the Convention was it never held a session behind closed doors or even a secret committee meeting. The result was one of the most progressive Constitutions ever adopted in the United States. I will not comment on features other than the Judicial Article, except to point out that the Bill of Rights, while retaining all the old safeguards, contains such up-to-date provisions as protecting freedom of communication of thought by moving pictures, radio or television, opening jury service to women, authorizing the state to take depositions in criminal cases, and recognizing the right of labor to organize and bargain collectively.

The Judicial Article gives our judicial system a real organization which will make it possible to efficiently handle the increased business which is now following the end of the war. Our Supreme Court is given the responsibility for proper use of judicial personnel. It may temporarily transfer trial judges whose dockets are light to courts where judges are over-burdened. It can also by transfer increase the capacity of the appellate courts by creating temporary new divisions, manned by additional judges (either trial or appellate) called in to keep dockets on a current basis. The Supreme Court is also given the authority to establish rules of both civil and criminal practice and procedure for

all courts. Had it not been for the court plan, removing our Supreme Court from the influences of party politics, it is not likely that it would have been given such authority and responsibility.

Improvement in other courts was not overlooked. Justice of the peace courts were abolished and replaced by magistrate courts. These are really dignified courts, which will give many people who have no contact with any other courts a better impression of our judicial system. Citizen's rights are further safeguarded by providing that all final decisions, findings, rules and orders of any administrative agency, which are judicial or quasi judicial and affect private rights, are subject to direct review by the courts. It is provided that, in all cases where hearing by an agency is required by law, this review shall include the determination as to whether the findings are supported by competent and substantial evidence upon the whole record. This broader review has superseded all previous limited review statutes. (See *Wood v. Wagner Electric*, 197 S. W. (2d) 647.) It has been extended to new agencies by an excellent administrative procedure act. The necessity of real qualifications of learning and ability was also recognized by requiring judges of all courts (eventually including probate and magistrate courts) to be licensed attorneys. The fee system for compensation of judicial and enforcement officers was abolished and all such officers must be compensated by salaries fixed by the Legislature.

Likewise, since the adoption of the court plan, a different attitude became apparent in our legislature. Our 1943 Legislature had in its membership a number of progressive younger members of the Bar. It made a fine record in progressive legislation. It adopted a new code of civil procedure, bringing into Missouri procedure the many improvements of the New Federal Rules. It wrote a new modern corporation code. It established a Judicial Conference of all trial and appellate judges, with an executive secretary and a permanent central office, giving the judiciary the organization and means to survey its own work, find its problems, and remedy its defects. It also increased its own efficiency by creating a Legislative Council with a research director and staff to aid in preparing legislation and to do research work between sessions. All of these notable achievements in improving the administration of Justice were the result of the cooperative effort of our Bar with the people of our State which began with the campaigns for our court plan.

Our Legislature was in almost continuous session during 1945 and 1946 working on legislation to implement our new Con-

stitution. It was confronted with the overwhelming task of reorganizing the whole state government to conform to the new Constitution. At great personal sacrifice, our senators and representatives completed an excellent reorganization program which gives Missouri a state governmental organization second to none in the nation. The organization of the new magistrate courts and the administrative procedure bill, referred to above, would have been in themselves an enormous task for any one session of the Legislature. The comprehensive magistrate courts acts makes possible improvement in the courts with which most of our people come in contact. The legislation organizing these courts is already being considered as a model in other states. The new administrative procedure bill is perhaps the first in any state to be adopted on the model of the Uniform Administrative Procedure Act recently formulated by the National Conference of Commissioners on Uniform State Laws.

Our experience demonstrates that improvements can come surprisingly fast once an effort is made to get something started. There will always be those who say, "wait for a more propitious time." However, Abraham Lincoln once expressed the thought that real statesmanship is getting something done with whatever men and means are available. It is especially important to strengthen the institutions of democracy in these unsettled times. None of these are more important than those responsible for the administration of justice for they are essential to the preservation of our American form of government. Missouri has made real progress to that end.