# Saving the Missouri Plan

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Most of the attention given to state judicial selection in recent years has focused on the rising costs and increasingly negative tone of contested judicial elections. The emergence of multi-million dollar, no-holds-barred judicial campaigns has prompted reformers to offer a wide range of proposed incremental improvements to existing elective systems while generally eschewing commission-based appointments as a politically unrealistic alternative. States with some type of appointive system generally have seen themselves as immune from the hyper-politicization of judicial selection that has infested nearly all states with contestable judicial elections.

That feeling of safety is eroding, as systems of commission-based appointment, or merit selection, are now under concerted, coordinated attack across the country. Isolated legislative hostility towards merit selection plans has flared up in many states for years, but the latest threats bear the hallmarks of a nascent but well-financed and national-level advocacy campaign: consistency of message, reliance on stock arguments, and a clear "brand" pushed by a well-known national conservative legal organization. Opponents of existing merit selection plans are becoming increasingly vocal in a number of states including Arizona, Colorado, and Kansas.

The most aggressive campaign against merit selection is being waged in Missouri, which, in 1940, became the first state to adopt a commission-based appointment system. Critics of the Missouri Plan, led and financed by local and national conservative legal groups, have formed an independent expenditure group to advocate alternative judicial selection provisions, purchased billboards and other advertising throughout the state, and unsuccessfully pressured the sitting Republican governor (who recently announced that he will not seek re-election in November) to reject lists of nominees sent to him by the Appellate Judicial Commission for a state supreme court vacancy last year. Defenders of the current Missouri Plan, led by the state bar, have also formed an advocacy group. Both sides are girding for a serious fight, with another recent vacancy on the state supreme court waiting to be filled.

The critics object to the presence on the state's seven-member Appellate Judicial Commission of three lawyers chosen by election of the state bar association. They have charged that state bar elections invariably produce liberal-leaning trial lawyers who are hostile to business interests in general, and to the sitting governor in particular. They have advanced various proposals to alter the appointment authority for members of judicial nominating commissions, most of which grant exclusive authority to the governor to appoint and remove commissioners at his or her whim.

The critics also have charged that the rules and procedures used by nominating commissions in Missouri are overly secretive. Although most merit selection systems could benefit from greater transparency, critics of the Missouri Plan have offered solutions that would make sensitive personal information public. One proposed bill in Missouri goes so far as to subject persons interviewed by nominating commissions about applicants' fitness for office to legislative subpoena to divulge, upon penalty of perjury, the substance of their conversations with commissioners.

Proposals such as these might well have the effect of discouraging qualified individuals from seeking judgeships. Yet, of all the proposals put forth thus far by critics of merit selection systems, perhaps the most pernicious is that which would grant sole authority to the governor to select nominating commissioners. It is extremely bad public policy to vest such enormous authority in the hands of one elected official. The citizens of Florida are continuing to suffer from a similar alteration to their state's previously sound merit selection system in 2001. According to numerous commentators and news reports, this change has injected inappropriate and destructive political influences into the state's many nominating commissions. Diver-

sity in the sources selecting nominating commissioners can provide protection against both partisan domination and attempts to make judges policy agents of the appointing authority.

The common thread running through the new attacks on merit selection plans is an anti-lawyer message, which, ironically, is being advanced primarily by lawyers. By removing the organized bar from the process of selecting nominating commissioners and vesting that authority in the political branches, opponents of current merit selection systems hope to gain a political advantage in the ultimate selection of judges. Legislators and the public should not buy into the argument that these proposals are intended to foster legitimate accountability in the selection process. The participation of the organized bar in the selection of nominating commissioners promotes an appropriate focus on professional qualifications of judicial aspirants. Equally important, the bar's leavening influence makes it more difficult to use selection committees to advance individuals whose level of "accountability" means that they lack the capacity for judicial independence.

As *Judicature* readers and AJS members know, this organization played a key role not only in designing the earliest models for judicial selection, but also in promoting its adoption in Missouri and elsewhere from the 1940s to the present day. Although AJS accepts that reforms to judicial elections may be desirable and necessary in the short term, the organization retains a strong preference for merit selection systems over contested elections or pure appointment. AJS will continue to defend existing merit selection systems from attack, suggest improvements to such systems – particularly in the areas of transparency and public input – and promote the adoption of new systems across the country. AJS Model Judicial Selection Provisions, available on the AJS website (www.ajs.org), provide a range of improvements and enhancements that we encourage all states to consider.

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