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## Evolution of the Missouri System

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## THE EVOLUTION OF THE MISSOURI SYSTEM

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Should the chief and associate justices of State Supreme Courts be appointed by governors or elected by voters; should they serve for life terms or for limited terms; and, if for limited terms, should these terms be long or short? These queries long have been vital issues in the "great debates" of American political science. In seeking to obtain judicial objectivity, impartiality, and responsibility, the several states have responded with several plans at different times. The agreed-upon plan at a particular time in an individual state has reflected the contemporary political environment, governmental philosophy, or pressing public problems. Missouri's Non-Partisan Court Plan, a pioneer in state government, is highly regarded by virtually all students of the administration of justice; therefore, it would be beneficial and interesting for us to contemplate the progressive course of the method of selection and the matter of tenure of judges in that state.

In the colonial period, judges of the colony Supreme Courts were appointed by the Royal Governor, and the Governor, sitting with his council, acted as the highest court of the colony. Following the American Revolution, state governments began their existence with appointive judges. Thus, when Missouri obtained statehood on August 10, 1821, her constitution, written in 1820, provided that:

. . . the Governor shall nominate, and by and with the advice of the Senate, appoint the judges of the Supreme Court . . . each of whom shall hold office during good behavior.<sup>1</sup>

Andrew Jackson, as the chief apostle of the movement in the United States which rejected political aristocracy and exalted the "common man" and as the victor in the 1828 presidential election, ushered in a dramatic era of democratic changes on the national, state, and local levels of government. "Jacksonian democracy" sought — and largely achieved — universal manhood suffrage, popular election of officials, short terms and rotation in office, and the "spoils system." The state of Mississippi, with the general election of 1832, became the first state to reflect these trends by adopting the popular election of judges for short terms of office.

Missouri's second constitutional convention was called by the voters in 1844, with almost 35,000 in favor of having the convention and 14,000 in opposition. While this convention was drafting a new constitution during the following year, several resolutions calling for elective judges were tabled.<sup>2</sup> Finally, Article V of the proposed con-

<sup>1</sup>Constitution of Missouri, 1820, Article V, Section 13.

<sup>2</sup>Journal of the Convention of the State of Missouri of 1845, printed by James Luek, 1845, Jefferson City, p. 6, 47-48.

stitution provided that the State Supreme Court was to consist of three judges appointed by the Governor with the consent of the Senate for twelve-year terms. Thomas Hart Benton, sixty-three-year-old senior United States Senator from Missouri, was a "Jackson man" with a long record for more democracy in government; thus, in harmony with his record, he could have been expected to take the lead in advocating an elective judiciary with a limited tenure. Mr. Benton, however, was more concerned—at that time—that the convention maintain constitutional restrictions on banking. Incidentally, while Missouri's constitutional convention was meeting in 1845, New York adopted the method of popular election of State Supreme Court judges for limited terms. Nevertheless, the product of the convention was rejected by the voters of Missouri in the subsequent general election of 1846 by a majority of 10,000 votes. In this defeat, the determining issue was not an elective judiciary but rather legislative apportionment based on population.<sup>3</sup>

An amendment to the constitution of Missouri of 1820 limiting the terms of Supreme Court judges to twelve years received the mandatory two-thirds-majority vote in the Fourteenth General Assembly in 1846, the year of the defeat of a proposed constitution.<sup>4</sup> Subsequently, the Fifteenth General Assembly, as required for adoption by the constitution, ratified the amendment. Moreover, during this regular session in 1848, another amendment was proposed which provided for the popular election of Supreme Court judges for a six-year term.<sup>5</sup> When the succeeding legislature of 1850 ratified the amendment,<sup>6</sup> Missouri joined the states with elective judges. Political party nomination was by a state-wide convention.

In general, a quiescent period in Missouri ensued upon the subject of judicial selection and tenure, and it was not a polemic topic until the 1930's, more than 80 years later. For example, following the Civil War, the constitutional convention of 1865—meeting in the Mercantile Library in St. Louis—was primarily concerned with purging the state government of those officials who had been sympathetic to the Confederate States of America. Consequently, there was no discussion whatever concerning the selection and tenure of judges;<sup>7</sup> however, the "Drake Convention"—so termed because of the powerful influence of the convention's vice-president, Charles D. Drake—did

<sup>3</sup>Edwin C. McReynolds, *Missouri: A History of the Crossroads State*, Norman: University of Oklahoma Press, 1962, p. 175.

<sup>4</sup>*Laws of Missouri*, Session Acts, 14th General Assembly, 1846-1847, p. 5.

<sup>5</sup>*Laws of Missouri*, Session Acts, 15th General Assembly, 1848-1849, p. 9.

<sup>6</sup>*Laws of Missouri*, Session Acts, 16th General Assembly, 1850-1851, p. 4-5.

<sup>7</sup>*Journal of Missouri Constitutional Convention of 1865*, p. 96-100.

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pass a resolution vacating all judicial offices and providing for the filling of these positions by appointment of the Governor.<sup>8</sup>

At Missouri's fourth constitutional convention, which met in Jefferson City in 1875 and lasted for almost three months, debate was long and bitter over the questions of election by districts and election of judicial officials on separate days from other political officials.<sup>9</sup> It was evident that the elective principle was firmly entrenched. The basic law finally agreed upon by the delegates included a judicial article that provided for the election of five Supreme Court judges to serve for ten-year terms.<sup>10</sup> The 44th General Assembly, convening in 1907, enacted a method of nomination of judicial officers by party primary.

During Missouri's fifth constitutional convention, there was even less effort made to change the method of selection and the length of tenure than had been made in 1875.<sup>11</sup> Many of the 83 delegates to the 1922 — 1923 convention, which convened in Jefferson City, believed that the practice of nomination by judicial nominating convention should be reintroduced;<sup>12</sup> however, such a resolution was not proposed formally. A section of the constitution which was drafted by this convention provided for nomination of judicial candidates at a date different from the nomination of other candidates — to prevent the selection of judges from falling under political consideration and excitement which pervades during general elections.<sup>13</sup> If the proposed document had obtained popular ratification, this stipulation would have had the effect of again establishing judicial nominating conventions.

Fifteen years later, a special committee of the St. Louis Bar Association observed that

. . . the system of nominating judicial candidates through party conventions, which was abandoned more than a quarter of a century ago, was as bad as, if not worse than, the present system. . . a return to that system would result in even more hopeless political entanglement of the judiciary than exists at the present time, for the steam-rolling effectiveness of machine politics today is, in our opinion, even greater than it was in the days of party conventions.<sup>14</sup>

<sup>8</sup>**Constitution of Missouri, 1865, Article VI.**

<sup>9</sup>**Debate of Missouri Constitutional Convention of 1875**, published in Columbia from 1930 to 1944, Volume VI, pp. 349-350; Volume VII, pp. 57-59.

<sup>10</sup>**Constitution of Missouri, 1875, Article VI, Sections 4, 5, 12, 13, 24, 25, 30.**

<sup>11</sup>**Debates of Missouri Constitutional Convention, 1922-1923, 206th day.**

<sup>12</sup>*ibid.*, 176th day, pp. 24-34.

<sup>13</sup>**Official Manual of the State of Missouri, 1923-1924, pp. 529-533.**

<sup>14</sup>**Journal of the American Judicature Society, Volume 21, June, 1937,**

Just prior to the First World War, there was a growing demand for judicial reform, an influence of the "Progressive era." Various organizations began to discuss the "thorny" problems involved, to make studies, and to make suggestions for change. For example, the American Judicature Society, an organization supported by professors of law, judges, and leading lawyers, was formed in 1913. One of its chief objectives was to "secure some method of selection more satisfactory than popular election has proven to be."<sup>15</sup>

In 1921, Albert M. Kales—Professor of Law at Harvard University, author of several books and articles on the legal process, and member of the Illinois bar—advocated a plan whereby the people would elect a chief justice to serve for a short term, who would—in turn—select men to fill vacancies in the "court of last resort." The associate justices would sit for an indeterminate period, going before the people at periodic intervals for popular confirmation, and they would serve as an advisory body for the appointment of lower court judges.<sup>16</sup>

Harold J. Laski, eminent English political scientist, formulated a plan in 1926 which would have the Governor appoint the lower court judges from a list of three names submitted to him by a committee composed of the judges of the Supreme Court, the Attorney General, and the president of the state bar association. When a judge was to be selected for the higher judicial posts, Laski would have them selected from existing judges.<sup>17</sup>

The Supreme Court of Missouri established a Judicial Council in 1934, which was composed of eleven men—nine were appointed by the Supreme Court, two *ex officio* members were chairmen of the Judiciary Committees of the Senate and of the House of Representatives of the General Assembly.<sup>18</sup> The Council was to conduct studies and to make annual reports and recommendations for enhancing the administration of justice in Missouri.

The first positive step in the movement for reform of judicial selection in Missouri was taken in the spring of 1936, with the creation of a special committee on judicial selection and tenure by the St. Louis Bar Association.<sup>19</sup>

In February, 1937, the House of Delegates of the American Bar

<sup>15</sup>*ibid.*, Volume I, Number I, 1917, p. 3.

<sup>16</sup>Albert M. Kales, "Methods of Selecting and Retiring Judges," *ibid.*, Volume 11, February, 1928, pp. 133-144.

<sup>17</sup>Harold J. Laski, "Techniques of Judicial Appointment," *Michigan Law Review*, Volume 24, April, 1926, pp. 529-543.

<sup>18</sup>*Rules of Supreme Court of Missouri*, Missouri Reports, Volume 334, pp. xix-xx.

<sup>19</sup>*Journal of the American Judicature Society*, Volume 21, February, 1938, p. 145.

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Association, composed almost wholly of representatives of state bar associations, adopted the following general plan as the most acceptable substitute available for direct popular election of State Supreme Court judges — a plan which resembles Harold J. Laski's previously-formulated recommendation.

(1) The filling of vacancies by appointment by the Governor or other elected official(s) from a list named by another agency. This other agency to be composed of high judicial officers and laymen selected for this one purpose, holding no other public office.

(2) If further check on these appointments is desired, confirmation by the State Senate or other legislative body may be used.

(3) After a period of service, the judge is eligible for either reappointment, or to go before the people, who would vote upon the question "shall Judge Blank be retained in office?"<sup>20</sup>

In the meantime and after several months of intensive research, the special committee of the St. Louis Bar Association on judicial selection and tenure — which had made an exceptionally able study of the subject — submitted a preliminary report on September 20, 1937.<sup>21</sup> This report — in brief — stated that nominations were to be by a state judiciary commission, composed of one lawyer and one layman from each of the three appellate districts, and the chief justice was to be the chairman. The bar in each district was to elect the law members; the Governor was to appoint the lay members — one from each district. Commission members had staggered nine-year terms. The submission of three nominees for possible appointment by the Governor was to be rendered by the commission when and if there was a vacancy or one became imminent by virtue of the failure of an incumbent to file a declaration of candidacy sixty days before the "last general election preceding the expiration of his term of office."<sup>22</sup>

Within the subsequent two-year period, Professor Israel Treiman of Washington University, Vice-chairman of the committee on judicial selection and tenure, with the competent assistance of members of the bar, took charge of the drafting of a proposed constitutional amendment which was approved by the Missouri Bar Association in 1939. As a result of a joint resolution by the Missouri and St. Louis Bar Associations, the proposed constitutional amendment was presented to the General Assembly. The regular procedure for amending the constitution of Missouri consisted of two steps: firstly, approval by two-

<sup>20</sup>*American Bar Association Journal*, Volume 23, Number 2, February, 1937, p. 105.

<sup>21</sup>*Journal of the American Judicature Society*, *op. cit.*

<sup>22</sup>*Missouri Bar Journal*, Volume 10, Number 1, January, 1939, p. 14.

thirds majority of all members elected to both chambers of the General Assembly; secondly, popular ratification by a simple majority of the voters voting thereon in the subsequent general election.<sup>23</sup>

After being introduced into the House of Representatives, the plan was referred to the Committee on Constitutional Amendments. Representatives of the Missouri and St. Louis Bar Associations, as well as other interested citizens, appeared in behalf of the Court Plan, and no one appeared to oppose it. Nevertheless, the committee without any explanation reported the amendment "unfavorably."<sup>24</sup>

The abortive attempt to induce the legislature to submit the Plan to the state's voters did not discourage — and only momentarily delayed — proponents, who immediately began to take steps to place it on the ballot by means of an initiative petition.<sup>25</sup> By this method, signatures of five per cent of the voters of two-thirds of the Congressional districts were needed to place the Plan on the ballot at the forthcoming election.<sup>26</sup> On July 2, petitions bearing 74,075 signatures — twice the necessary number — were filed with Secretary of State Dwight H. Brown in Jefferson City.<sup>27</sup>

The Missouri Bar Association — of which Kenneth Teasdale, a leading St. Louis attorney, was president — led the vigorous fight for adoption of the progressive plan. A determining factor in their success was the enlistment of support by lay agencies representing all interests of and all sections of the state. The Missouri Institute for the Administration of Justice, an outgrowth of the Missouri Bar Association Conference on Criminal Justice in February, 1937, was the chief organ of the campaign. J. Lionberger Davis, an outstanding civic leader, was chosen as its president and Kenneth Teasdale as its counsel.

In organizing the Missouri Institute for the Administration of Justice, letters were sent to one hundred communities and chambers of commerce asking for recommendations of prominent laymen who would be interested in a program to improve the administration of justice.<sup>28</sup> The idea was to get a representative body composed of citizens who would have the confidence of their home communities and, therefore, whose leadership would elicit the support of their respective communities.

A strenuous state-wide campaign was waged — funds were solicited; speakers' bureaus were organized; and a four-page paper, "The

<sup>23</sup>*Missouri Bar Journal*, Volume 10, Number 8, October, 1939, p. 135.

<sup>24</sup>*Missouri House Journal*, 60th General Assembly, 1939, p. 698.

<sup>25</sup>*Bar Journal*, *op. cit.*

<sup>26</sup>*Revised Statutes of Missouri*, 1939, Section 12287.

<sup>27</sup>*Missouri Bar Journal*, Volume 11, Number 6, June, 1940, p. 85.

<sup>28</sup>Daniel Bartlett, "Missouri Bar Conference on Criminal Justice," *Missouri Bar Journal*, Volume 8, Number 3, March, 1937, pp. 36-38.



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M.I.A.J. News," was broadcast throughout the state. Moreover, the metropolitan press whole-heartedly supported the Plan. In short, Missourians — all the way from Hannibal to Neosho — received a valuable education in one important phase of the administration of justice.

Coincidentally, and perhaps not wholly unfortunately, the August primary of 1940 gave rise to a "public display of the evils of political selection in their darkest hue."<sup>29</sup> In the weeks preceding the primary, a special committee — assisted by two local bar associations in St. Louis — investigated all judicial candidates, and then published a list of recommendations omitting a number of unfit incumbents. Initially, the dominant political organization endorsed the founding of the committee but, straightway, abandoned it when its findings proved inconvenient. In the August primary election, characterized by a "state-wide resurgence of machine power," five of the rejected judicial candidates were nominated.

In the general election of 1940, there was a total of 980,836 votes cast on the proposed amendment; therefore, according to the state's constitution, a minimum of 490,418 votes was required for adoption.<sup>30</sup> There were 535,642 votes cast "for" the Plan — an endorsement of over 45,000 votes in excess of the mandatory minimum.<sup>31</sup> On December 5, 1940, just thirty days after the election, the Plan went into effect. The Plan was the only proposal which the voters approved; six others were rejected, most by sizable majorities. Its most thunderous endorsement was in metropolitan centers — Jackson County, St. Louis city, and St. Louis County. The Plan was limited to the selection of State Supreme and Appellate Court judges in metropolitan counties; thus, it was first tested where the need was felt most keenly.

The progressive — but hectic and uncertain — course of the Plan continued. The first regular measure introduced into the legislature at its subsequent regular session — House Joint and Concurrent Resolution Number One — called for the submission of a constitutional amendment that, in effect, would repeal the Missouri Court Plan.<sup>32</sup> The resolution passed the House of Representatives and the Senate by formidable margins!

At the subsequent general election of November, 1942, the people voted on Amendment Number Four, which read as follows:

Amendment repealing an amendment to Article VI of

<sup>29</sup>*Journal of the American Judicature Society*, Volume 24, August, 1940, p. 64.

<sup>30</sup>*Constitution of Missouri*, 1875, Article XV, Section 2.

<sup>31</sup>*Roster, op. cit.*, 1943-1944, p. 6.

<sup>32</sup>*Missouri House Journal*, 61st General Assembly, 1941, Volume 1, p. 118.



Missouri Constitution, relating to the nomination, appointment, and election of judges in certain courts.<sup>33</sup>

This Repeal Amendment was soundly defeated: of 605,609 votes cast on the amendment, there were about 390,000 negative and 215,000 affirmative votes. Many citizens of Missouri—and other interested observers—were delighted that the Missouri Non-Partisan Court Plan was, at last, to be given a trial!

Although the Plan had an obvious, resounding mandate, a number of delegates to the Missouri constitutional convention of 1943—1944 were zealous in their antagonism to the Plan. Indeed, it became the most controversial question that had to be resolved by the delegates; however, after many debates, manifold proposals, and multitudinous votes, the Plan was adopted by the convention by a voice vote.<sup>34</sup>

Article V of the Missouri constitution of 1945 deals with the Judicial Department of the state; the non-partisan selection of judges is delineated in Section 29 of this article.

Recently, Glenn R. Winters, executive director of the American Judicature Society and editor of its journal, observed that the adoption of this court plan was "the greatest single event in the history of judicial reform in this century."<sup>35</sup> Missouri has given us an effective example; a dozen states have adopted all of or a part of the provisions of the "Missouri Plan," and more are headed that way. For example, the Arkansas Judiciary Study Commission, created by the 1963 Arkansas General Assembly, in its recent report to the 1965 General Assembly recommended a slight variation of the Missouri Plan. It is inevitable that progress of this kind is slow, due to a traditional reluctance to change practices which have been in effect for long years, partly to a lack of knowledge on the part of bodies which can make—or initiate—such changes. By its persuasive, progressive example, Missouri has contributed to the Nation's welfare.

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<sup>33</sup>Roster, *op. cit.*, 1943-1944, p. 6.

<sup>34</sup>Constitution of Missouri, 1945, Article V.

<sup>35</sup>Kansas City Star, April 15, 1964.