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The Missouri Plan

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"The Missouri Plan"

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Editor's Note: The following is the substance of an address delivered by this eminent member of the Missouri Supreme Court before the February 7 meeting of the Denver Bar Association. Members of the General Assembly attended as guests of the bar.

I have been asked to speak to you about the plan for the selection and tenure of judges which we now have in Missouri. Only because Missouri was the first to adopt it, it has become popularly known as the Missouri Plan. In reality it is the American Bar plan.

We hastily acknowledge that its original conception belongs to others. If other states see fit to adopt it, they may do so with our blessing under any name they choose. It may just as properly be the Colorado Plan, the Texas Plan and the Pennsylvania Plan, to mention three of the states where, among a number of others, it is now being advocated.

The present plan is the third method which Missouri has followed at different times in its search for one which would provide an independent judiciary. We all realize that only with an independent judiciary can a true democratic form of government exist.

To make a judge really independent, his office must be as free as possible from the threat of pressure exerted for improper purposes and selfish gain. The threat of such pressure is most generally applied through political means—defeat at the polls.

To insure freedom from the political pressure which ordinarily attends an elective office on a party ticket, security in office is the keystone of the independence of a judge.

The extent of that security must be sufficient to free a judge of political dependence, but not so absolute as might lead to or permit neglect of duty or abuse of power.

As a result of the plan our judges are free from political pressure. At the same time they are more faithful in the exercise of judicial self restraint and arrogance of office has disappeared.

Combining Best Features

We adopted the plan as a Constitutional amendment at the General Election in 1940.

Since it follows the method of selection and tenure set forth in your proposed concurrent resolution, I will deal with it briefly. Judges are nominated by commissions consisting of laymen and lawyers. The names of three qualified candidates for each judgeship are submitted to the Governor. He selects one of them. The new judge serves for one year, then goes on the ballot at the next election. The people have had a chance to see him in action, to know him, to judge his record. They go to the polls and simply answer one question: Shall Judge Blackstone of the District Court be retained in office? Yes or No?

Thus, the wisdom of a nominating commission, the responsibility of a governor and the will of the people are combined to provide a competent judiciary.

The plan combines the best features of both the appointive and elective systems, and adds new safeguards which assure a more competent judiciary.

The choice of the nominees is made by a group of persons which has no other function, and whose only interest would be to name the best qualified men available. A nominating commission is representative of both the bar and the people.

A governor will be careful in choosing his appointee from the three selected since his choice must later be confirmed by the people.

Then the necessity of approval by the entire electorate of the appointee's record tends to insure faithful service on the bench. If a judge decides to make a career of the bench, the requirement of confirmation of his record from term to term, on a nonpartisan basis, likewise insures faithful service throughout his career.

Under the plan a judge already in office when it was adopted needed only to signify his intention to run for reelection in order to have his name placed on the ballot. In such a case there was no need for any action by a nominating commission.

Political Activity Banned

The Missouri Constitutional provision and the Colorado plan prohibit political activity on the part of the judge.

No judge may directly or indirectly make any contribution to any political party or organization.

No judge may hold any office in any political party or organization.

No judge may take part in any political campaign.

Every judge under the plan whole-heartedly approves of this restriction. They welcome its protection, they loyally observe its terms. We find the office of judge is a full-time job. The people approve this restriction. Apparently they do not want the judges holding office in political parties, and devoting themselves to partisan purposes.

No candidate has refused consideration because of this restriction. Justice Holmes once said of a similar situation while everyone has a right to engage in politics, not every one has the natural right to be a judge. We find it has been very helpful in keeping political pressure off the court, and in keeping judges out of politics.

In our state, national issues have played the main part in most elections. We found under the old system the election of judges followed the national political trends. This was the case both in electing judges who had to run state-wide and those elected by the large cities only.

Under the party primary and election system, election of judges has depended on the national issues and not upon a judge's ability, qualifications or record. In the 20-year period between the first and second World Wars,

only twice was a judge of the Supreme Court, who had served a full term, reelected to another term. The ten elections during this period all turned on national party issues, and the records and qualifications of judicial candidates received but little, if any, attention.

A former judge of our court describes his fortunes at the polls this way: "I was elected in 1916 because Woodrow Wilson kept us out of war. I was defeated in 1920 because Woodrow Wilson did not keep us out of war. In both of the elections not more than five percent of the voters knew I was on the ticket." Such is not the case today under the plan.

High Quality of Nominating Commissions

The heart of the plan is the nominating commission. "I don't care," said Boss Tweed, "who does the electing just so I do the nominating." Our nominating commissions have the confidence and respect of the people, the press, and the bar.

Since the inception of the plan only outstanding lawyers have been elected to serve on the nominating commission, and only laymen of the highest character and standing have been appointed.

Not a single nomination by any commission has every been criticized by the bar or the press, although thirty-three nominations have been made to fill eleven vacancies; five on the appellate courts, and six on the trial courts. In every instance, all the nominees have been widely approved. Choosing lawyers of character, ability, learning and industry has been the rule.

No commission has ever been charged with playing partisan politics although lay members have been appointed first by a Democratic Governor, next by a Republican, and then by a Democrat. Every set of nominations has represented both major political parties, regardless of the political complexion of the commission. In no instance has a commission stacked the list of nominees against the Governor by naming only those of the opposite political faith.

Recently, there were nominated for a vacancy on the trial bench in Kansas City a Republican and two Democrats, all lawyers of great ability and high integrity. The two Democrats had actively supported an opponent of the Governor in his primary campaign. But the Democrat who had been the more active in his opposition was selected by the Governor. *The Kansas City Times* observed editorially:

> "The nonpartisan court plan's procedure has scored again . . . If Governor Donnelly had appointed either of the other two candidates he would have made a good selection . . . We congratulate the new judge, the commission that made the nomination, Governor Donnelly and the State that is making a fine national reputation by nonpolitical courts."

The nominees for the appellate courts have been representative of the entire state in the case of the Supreme Court, and of the entire district for a court of appeals.

Any one who wishes is free to become a candidate for nomination by a commission. Wide publicity is given to a vacancy, and to the deadline for submitting names of candidates. The commission, on its own initiative, may seek out candidates; a lawyer desiring the office may submit his own name, or have someone do it for him. This is done merely by letter to the Chairman.

When a name is received, a simple questionnaire is submitted to the candidate in order to ascertain if the candidate has the qualifications required by law for the office, and to give to the lay members, especially, personal and professional information about the candiate. Letters of recommendation are welcomed. After a sufficient period has elapsed for the names of all those wishing to be candidates to be submitted, and for investigation and study by the commission, the members meet and choose the three nominees to be submitted to the Governor.

The lay members have always been faithful and conscientious in informing themselves about the candidates. They consult with lawyer friends and business acquaintances who know the candidates. They make personal investigations, and reach their own independent appraisal of each candidate.

No partisan political pressure has succeeded in forcing the nomination of any person. It may have been attempted; if so it has been rebuffed. Judges have been named for promotion, and qualified practitioners have been placed on the appellate bench.

So long as the nominating commissions continue to name qualified, able and conscientious nominees, as they have done in the past there can be no bad appointment regardless of the person who may occupy the Governor's chair.

Proof of the Pudding

Of course the plan has its enemies.

One objection has been that the plan is not truly nonpartisan because each governor so far has followed party lines in choosing his appointee from the three nominees.

Answering this, the *St. Louis Post Dispatch,* while urging a governor sometime to cross the party line, stated:

> "What is important is not so much that the Governor appoints without considering party affiliations, but that he be confronted, in every instance, with a field of three good choices, as nominated by the official bar commission. This is where the nonpartisan court plan does its first good work. It gets a higher level of prospective judgeship material up for consideration than was produced in the slating of candidates by self-serving political bosses. Its next good work is in retaining judges on the bench so long as their records meet with the approval of the voters."

Even though there may have been partisanship in the apointments, it is of real and special significance that partisan politics has not entered in the general elections where judges have been retained, or not retained in office.

In 1942 the state went Republican but two qualified Supreme Court judges, both Democrats, ran for reelection and were retained in office. The City of St. Louis, which also went Republican, reelected 6 Democratic circuit judges and retained a Republican circuit judge previously named by the Governor. Jackson County (Kansas City) went Democratic, but the voters there removed one circuit judge, a Democrat, and retained one, also a Democrat, who had made an outstanding record on the bench.

In 1944, the Democrats were successful, and 14 judicial candidates, 4 Republican and 10 Democratic, all approved by polls taken by the bar associations, were retained in office. Then in 1946 St. Louis went Republican but retained 10 Democratic judges in office.

Thus, it should be apparent that partisan political considerations have been effectively removed from voting on the members of the judiciary.

At the last general election (1948) the State went Democratic, as did Kansas City and St. Louis. Yet of the two judges reelected in Kansas City one was a Republican; and of the seven judges reelected in St. Louis also, one was a Republican.

In 1944, Judge Laurance M. Hyde of the Supreme Court and I both ran for reelection. He is a well-known Republican. His brother was a Republican Governor and later a member of President Hoover's Cabinet. I am a Democrat. In that election the state went Democratic. Yet, Judge Hyde, long and prominently known as a Republican, polled about the same vote I did in our overwhelmingly Democratic counties known as Missouri's "Little Dixie", and I ran about even with Judge Hyde in the solidly Republican counties.

Other Objections Answered

It is charged that the plan has tended to freeze in office all judges, good, bad and indifferent, who were on the bench when the plan was adopted. It does do this. A judge runs against no political opponent, either of an opposing or of his own party; he is not of course subject to a primary election. He runs only on his record of service on the bench. Unless that record is corrupt or obviously inefficient, there is every reason to expect he would receive a favorable vote. But unless an incumbent has proved unworthy or incapable, he should be retained under the spirit and purpose of the plan.

On the other hand, an unwanted incumbent can be turned out. A trial judge of Jackson County was opposed by the bar and was not retained when he ran for reelection.

The plan has been criticized as undemocratic. I do not believe this charge is well founded.

The charge arises from the fact that in Missouri the people do not nominate judges at a primary election. However, when our government was formed, and for many years after, we followed the custom in this country of appointing all the judges. We still do with the Federal judiciary.

The plan does delegate to a representative group the duty of choosing the nominees; and to the Governor the selection of the one, but reserves to the people themselves the right of election. Every aspirant for judicial office is still free to submit his candidacy for consideration by a nominating commission.

In the past, choosing judicial nominees has been delegated to political party conventions as representative of only a part of the people, but that was not then believed to be undemocratic. Later, however, even party responsibility was removed in Missouri by substituting the direct primary for party conventions for all offices, including judicial ones. In Colorado, I understand, you designate at party assemblies and nominate at the later primary.

It is true that in a democracy political office-holders, and through them the policies and political principles which they avow, must give periodic accounting to the voters. Their submission to "the will of the people" means, in practice, that they and their policies must be judged at regular intervals by a secret ballot, on which the voters are free to oppose them, and to turn to new and different policies.

But what political policy or principle can a judge properly entertain about the administration of his office? It is immediately obvious there can be none whatever. No one would contend a judge should represent only his own party on the bench. In fact, a judge represents no one; he serves everyone. The only principle a judge can advocate is fair, impartial and sure justice to all. And this must be so, be he a Republican or a Democrat, or a Liberal or a Conservative Democrat. A judge's record becomes his only platform, and upon it he is retained by the voters, or turned out by the voters.

A Democratic Plan Which the People Approve

I do not believe the charge that the plan is undemocratic has been sustained; to the contrary, the opposite seems true. A judge's record is submitted to and passed upon by the voters, unconfused with purely partisan political issues.

A plan which tends toward independent judges as this one does, surely not only follows the fundamental principles of democracy, but preserves democracy itself.

There can be no doubt but that the people of Missouri approve the plan. Never has a Constitutional change been better tested. The people expressed their approval of it at the polls not once but three times, and each time by a greater vote.

The plan was adopted in 1940 as a Constitutional amendment by the vote of the people. The plurality favoring it was 90,000. Two years later the people voted to hold on to the plan. The plurality was doubled in that election to 180,000.

The following year plans were made for a Constitutional Convention. Delegates were elected by local party committees. Delegates-at-large were agreed upon by State Republican and Democratic Committees acting together.

The Delegates included ward political committeemen, and more prominent political leaders as well as educators, lawyers, labor leaders and businessmen. After a debate the Convention not only adopted the plan without changing a word, but even put two more courts under it. These two were the Courts of Criminal Correction in St. Louis which handle misdemeanor cases and appeals from the police courts. These courts had long been used for political advantage. Not only was the application of the plan extended, but the Convention by the new Constitution placed more power and responsibility in the Supreme Court than that possessed by the Supreme Court of any other state at that time.

The popularity of the plan had much to do with the overwhelming approval of the new Constitution. It was adopted by a large vote at a special election in February, 1945 despite the upset conditions of the war. At that time the plan had had four full years of operation. For the third time the people spoke in its favor.

Lawyers Now Approve

When the plan was first proposed most of the lawyers were either indifferent to the plan because they assumed it had no chance of being adopted, or opposed it. The bar of rural Missouri was almost unanimous in its opposition. But now the great majority of the lawyers of the entire state enthusiastically favor it.

An unanticipated result of the plan has been the much closer relationship between the bench and the bar. The judges are now more familiar and are more concerned with the lawyers' problems in administering the courts than ever before.

Our state bar has properly undertaken the duty of informing the people about the judges, and advising whether or not they deserve a favorable vote for retention in office.

In advance of an election the state bar polls the lawyers as to whether a candidate for reelection should be retained. This is a statewide referendum of lawyers on the Supreme Court judges, or district wide on others. If the vote is favorable the bar then undertakes the campaign for retaining the judge in office.

The bar is managed by a board of governors. The majority of the board are lawyers from the rural sections. Yet at the last election the board voted to expend funds for advertisements in rural newspapers, where education on the plan was needed, urging the voters to vote the judicial ballot and to retain in office the judges which had been previously approved by the lawyers.

The judges take an active part in the work of the bar. They attend the meetings. As I say, they are much closer to all the lawyers than they ever were before.

Under the new Constitution we have attempted to improve our old justice of the peace courts in making them more efficient and more useful to the people. We replaced them with a new system of Magistrate Courts.

The administration of the new system fell down in St. Louis. The bar association there appointed a committee of lawyers to look into the matter.

One of the recommendations made by the lawyers was that these Magistrate Courts in St. Louis should be placed under the court plan. This recommendation was adopted by the association.

The *St. Louis Globe Democrat* urged editorially:

> "The remedy is to extend the nonpartisan court plan to include the Magistrate Courts.
>
> "The Bar Association will render a worthwhile service to the community if it accepts the responsibility of urging this reform upon the Legislature."

Judges Are for the Plan

The judges, both those now under the plan, and those not under it, are universally in favor of it.

Some one has said that a politician may ordinarily make a good judge if he can stop being a politician when he goes on the bench, but the usual system for election requires a judge to continue to be a politician in order to remain a judge. Under the plan a judge need not be a politician, in fact he must refrain from politics.

When Judge Hyde and I were reelected under the plan in 1944, we spent our time at our desks doing our normal work instead of campaigning throughout the state for months, first for nomination at the primary, and then for election at the General Election. We were forbidden to make any political contributions.

Of real importance is the fact a judge may devote his full time to his official duties. These have increased in the highest courts, at least, because of the many added responsibilities such as formulating rules of procedure, and administering the state's judicial system.

I might observe it was only after the plan had been in operation for several years that our Supreme Court for the first time in decades became absolutely current with its docket, and has since remained so.

A judge may now devote his energies to becoming a better judge and to improving the administration of justice and to improving the judicial system.

The trial judges throughout Missouri who are not included in the plan are hopeful it will be extended to them. Your Colorado plan includes all Supreme, District and some County Judges.

The Plan Has Produced Good Judges

The plan has grown in approval because it has produced good judges.

Lawyers with successful practices but no political bent have been induced to give up the practice and come to the bench. A statewide campaign over a state even as large as Missouri, for office on the Supreme Court, has seldom proved to be an attraction to the successful, learned, studious prac-

titioner, but by the present plan men of such type are being added to that court.

Only recently the *Kansas City Star*, speaking editorially of the plan, said:

> "It has not succeeded in removing all unqualified persons from the bench. But those who have reached the bench through the nonpartisan court system have proved to be good judges. On the average those who held over from the political era have been better judges. No longer does the shadow of the political boss fall across the bench."

So we find the people like the plan, the press approves it, the lawyers are for it, and the judges like it.

Labor Injunctions Under The Colorado Labor Peace Act

By PHILIP HORNBEIN, JR.
of The Denver Bar

The labor injunction plays an important part in the scheme evolved by the thirty-fourth General Assembly for the control and regulation of labor unions known as the Colorado Labor Peace Act.[1] The Act itself is an omnibus piece of legislation designed to exercise a far-reaching control over all phases of labor union activity. Briefly, the over-all objectives of the Act may be summarized as follows:

1. To confine labor disputes to the employees of a single employer.
2. To control the internal affairs of labor unions and prohibit their political activity.[2]
3. To restrict the processes of collective bargaining with reference to certain types of contracts.
4. To limit the use of strikes, boycotts, and picketing and to prohibit their use completely in some cases.
5. To restore the power to courts of equity to issue labor injunctions.

This article is confined to a discussion of the use of injunctions under the Act. Prior to the passage of the Act in 1943, Colorado had what properly could be called a "little Norris-LaGuardia Act"[3] which limited the issuance of injunctions in labor disputes to cases involving physical injury to person or property with which the law enforcement authorities were unable to cope. The term "labor dispute" was defined broadly enough to include organizational disputes—that is, attempts by a union to organize the workers of a non-union plant.[4]

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[1] Chap. 131, 1943 Session Laws of Colorado.

[2] This feature of the Act was declared unconstitutional by the Colorado Supreme Court in *American Federation of Labor v. Reilly*, 113 Colo. 90, 155 P. (2d) 145, 160 A.L.R. 873.

[3] Chap. 59, 1933 Session Laws of Colorado.

[4] Ibid. Sec. 12; *Denver Local Union v. Perry Truck Lines*, 106 Colo. 25, 101 P(2) 436, *Denver Local Union v. Buckingham*, 108 Colo. 419, 118 P(2) 1088.