Legal Memorandum
Published by The Heritage Foundation
No. 57
September 9, 2010

A Defense of the Elected Judiciary

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Abstract: *The assault against elected judges has entered a new and more dangerous phase: Millions of dollars are being poured into efforts to promote "merit" selection of state judges, a system in which unelected, unaccountable experts and special interests recommend for appointment—and in some cases select—judges as a way to combat politicization. Yet merit selection does not remove politics from the judicial selection process; it merely drags politics out of the public spotlight, much to the advantage of liberal special interests—and to the detriment of public accountability. While not perfect, judicial elections are far more effective than "merit" selection as a means of promoting judicial independence and public accountability.*

In recent years, the battle over state judicial selection has intensified. Millions of dollars have been poured into efforts to encourage states that still embrace popular election of judges to switch to selection by unelected "expert" commissions—a system often called "merit selection" or the "Missouri Plan."

The idea is not a new one. The American Judicature Society began its push for merit selection in 1913 and continues to promote it today. The idea has influential, politically active, and wealthy advocates, including former Supreme Court Justice Sandra Day O'Connor and organizations funded by George Soros such as the Brennan Center, Justice at Stake, and the Open Society Institute. Proponents of this system decry the increased spending in state judicial races, which they assert undermines judicial independence.[1] They reiterate the need for a selection

Talking Points

- Activist judges and activist judicial rulings have led to the increasing politicization of judicial selection.
- A well-funded movement advocates "merit" selection in which unelected, unaccountable experts and special interests recommend for appointment—and in some cases select—judges as a way to combat politicization.
- But "merit" selection does not remove politics from the judicial selection process; it moves the politics behind closed doors, both to the advantage of liberal special interests and to the detriment of public accountability.
- Judicial elections are subject to potential flaws, but there are due process checks in that system to remedy even an appearance of partiality.
- Judicial elections better meet the goals of promoting judicial independence and assuring public accountability than does "merit selection."

This paper, in its entirety, can be found at:
http://report.heritage.org/lm0057

Produced by the Center for Legal & Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

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method that is based on the credentials of the nominees rather than their policy views as expressed in campaign ads.

Judges have become more inclined to engage in judicial activism, issuing decisions adhering to policy preferences rather than law. As these activist decisions have taken what were once properly political decisions out of the hands of the properly political branches (the legislative and executive branches), the selection of judges at both the state and federal levels has correspondingly become a politically charged process.

The suggestion that states should forgo judicial elections because of claims of the appearance of politicization and turn instead to judicial selection by unaccountable commissions fails to address the underlying problem.

The suggestion, then, that states should forgo judicial elections because of claims of the appearance of a threat to judicial independence and of politicization and turn instead to judicial selection by unaccountable commissions fails to address the underlying problem. Indeed, the commission selection model has greater problems of its own, including an extreme lack of accountability to the public. Significantly, merit selection does not even remove politics from the selection process—the very reason for moving away from elections—but simply moves politics behind closed doors and away from public scrutiny.

The best method is one in which both judicial independence and public accountability are protected to the greatest extent possible. Judicial elections are superior to the Missouri Plan in securing this aim.

Overview of State Judicial Selection

There are three methods of state judicial selection, and each state's constitution and laws prescribe the means in that particular state. The three models are popular elections,[2] appointment by public officials,[3] and the Missouri Plan, or selection by an unelected commission.[4]

Elections, which are the most common form of state judicial selection, can either be partisan or nonpartisan. The oldest method, appointment, typically involves gubernatorial selection with state Senate confirmation.[5]

Under selection by unelected commissions, also known as the Missouri Plan or merit selection, a panel of commissioners presents a handful of potential candidates to the governor, and the governor chooses from among these candidates. If the governor refuses to choose from the list, in some states, the commission makes the selection on its own.[6] After a judge has served for a certain amount of time, the public then decides whether to retain him or her in an uncontested retention election.

1. JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE, 5 (August 2010).
2. States with partisan elections: Alabama, Illinois, Louisiana, New Mexico, Pennsylvania, Texas, and West Virginia. States with nonpartisan elections: Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, and Wisconsin.
3. California, Maine, Massachusetts, New Hampshire, and New Jersey have gubernatorial appointment. South Carolina. and Virginia have legislative appointment.
4. In some states and the District of Columbia (Connecticut, the District of Columbia, Hawaii, New York, Rhode Island, Tennessee, and Vermont), the governor influences the commission. In others (Arizona, Colorado, Delaware, Florida, Maryland, and Utah), the legislature influences the commission. In the states with the lowest level of public input (South Dakota, Alaska, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, and Wyoming), the state bar either influences or controls the commission entirely.
5. This is often referred to as the "federal model" because federal judges are selected in a similar manner: The President nominates, and the Senate confirms.
6. Stephen Ware, *Missouri Plan in National Perspective*, 74 MO. L. REV. 751, n. 37 (2009); *See, e.g.*, MO. CONST. art. V, § 25(a); KAN. CONST. art. 3 § 5(b); OKLA. CONST. art. VII-B, § 4.

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At America's Founding, all state supreme court judges were appointed by elected officials. Of the original 13 states, eight used legislative selection, and five used gubernatorial appointment.[7] In a majority of the states, judges had lifetime tenure, subject to good behavior.[8] In the beginning of the 19th century, concerns about judicial accountability led to a shift to elective systems.[9]

By the time of the Civil War, the vast majority of states had moved to elections.[10] It was not until the Progressive Era in the 1930s and 1940s that states began to switch to selection by "merit" commissions.[11] This move was consistent with the Progressives' attempt to shift control of government decision-making from the electorate to "experts."[12] Ostensibly, the goal behind these commissions was the selection of better-qualified judges divorced from party politics.[13]

The Myth of Merit Selection

Opponents of judicial elections contend that elections lead to the elevation of judges based on their political views rather than their legal skills and approach to the law. Thus, merit selection was designed as a putatively objective means of evaluating candidates based solely on their experience and abilities rather than on their political leanings.

A closer look at the process, however, reveals that this is far from the truth. Rather than removing politics from the judicial selection process, merit selection merely moves the politics behind closed doors and results in judges who reflect the political views of the interest groups in charge of their selection.

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The interest groups that support merit selection are predominantly liberal-leaning lawyers associations. Nine of the Missouri Plan states have a constitutional requirement that the majority of the commissioners must be lawyers or judges.[14] Further, unlike the other Missouri Plan states, which require participation of elected officials in the selection process,[15] the lawyer-commissioners in these nine states are selected by the state bar associations.[16]

Why is selection by lawyers problematic? The argument in support of the Missouri Plan is that a team of "experts" is more suited to select judicial nominees than are the whims of the American public or partisan politicians. Proponents of this system believe that attorneys, with their knowledge of the law and judicial process, would have a better understanding of the qualifications necessary for judges. Therefore, they argue, it is only proper that the state bar—the state's organization of attorneys—should be front and center in selecting judges.

7. EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 98 (1944).
8. J. H. 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, 316 (1997).
9. *Id.*
10. Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE, 176 (1980).
11. In 1940, Missouri was the first state to switch to selection by "merit" commissions. *See* Brian Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 678 (2009).
12. *Id.*
13. Daugherty, *supra* note 8 at 319.
14. These nine states are Alaska, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, and Wyoming. Ware, *supra* note 6, at 762.
15. These four states are Arizona, Colorado, Florida, and Tennessee.
16. This is so to a lesser degree in South Dakota, where the bar influences the commission but does not control it. Ware, *supra* note 6, at 762.

By advocating for selection by experts, proponents of merit selection seem to assume that commissions will be apolitical, but this assumption fails to take into account the underlying problem with the politicization of judicial selection: the deep disagreement regarding the proper role of the courts and judges, with one side asserting that judges should apply the law as it is written, according to its plain and original meaning, and the other asserting that judges are fundamentally political actors who should seek to rule based on preferred policy outcomes or empathy. This disagreement extends to experts and layman alike—in fact, it is likely to be expressed more stridently among experts—and has led to the increased politicization of the federal appointment and confirmation process, as well as increased political spending in judicial elections.

Far from removing politics, the shift to merit selection has simply skewed the politics of judicial selection in a way preferable to many of the liberal interest groups that are bankrolling the movement to eliminate judicial elections.

It would therefore seem naïve to believe that shifting the responsibility for judicial selection to unaccountable experts would remove politics from the process. Indeed, far from removing politics, the shift to merit selection has simply skewed the politics of judicial selection—and has done so in a way preferable to many of the liberal interest groups that are bankrolling the movement to eliminate judicial elections in favor of merit selection.[17]

Since the key to influencing which judges are chosen in a system of merit selection is influencing who is on the commission, it is not surprising that interest groups—in this case, liberal interest groups—have sought to capitalize on these favored positions and are overrepresented in the merit selection system. One such group that is overrepresented is trial lawyers. In Missouri, for example, all three lawyer-members of the commission are members of the Missouri Association of Trial Attorneys.[18]

Far from being "apolitical," even a cursory review of the giving of the American Association for Justice (formerly known as the Association of Trial Lawyers of America)—which since 1990 has given 91 percent of its federal contributions to Democrats—dispels any such myths.[19] The state trial bars exert great influence to undermine sensible efforts at tort reform, both through legislative lobbying and through their efforts to influence who is elected or selected for the courts.

Given the overrepresentation of liberal interest groups on commissions, it should not be surprising that the judicial nominees selected by these commissions share more liberal and Democratic leanings.

Given the overrepresentation of liberal interest groups on commissions, it should not be surprising that the judicial nominees selected by these commissions share these more liberal and Democratic leanings. Professor Brian Fitzpatrick has found that since 1995, 87 percent of Missouri judicial nominees have given more campaign contributions to Democrats than to Republicans—in a state where Democratic candidates received "roughly 50 percent of the general election votes in state and fed-

17. To learn more about the well-funded and coordinated effort to eliminate state judicial elections, *see* American Justice Partnership, *Justice Hijacked: Your Right to Vote Is at Stake* (Sept. 2010), *available at* http://www.americanjusticepartnership.org/hijacked.

18. Nancy Mogab, Larry Woodell, and Richard McLeod are members of the Missouri Association of Trial Attorneys. Woodell is on the Board of Governors thereof, and McLeod was formerly on the Board. A list of the commissioners can be found at Appellate Judiciary Commission, http://www.courts.mo.gov/page.jsp?id=158 (last visited Sept. 8, 2010). The MATA Board of Directors can be found at Missouri Association of Trial Attorneys, http://www.matanet.org/mo/index.cfm?event=showPage&pg=Officers (last visited Sept. 8, 2010).

19. See American Center for Responsible Politics, Open Secrets, American Assn. for Justice, http://www.opensecrets.org/orgs/summary.php?id=D000000065 (last visited Sept. 8, 2010).

eral House races."[20] And in Tennessee, 67 percent of appellate nominees voted in Democratic primaries—again, in a state that is roughly evenly divided between the two major parties.[21]

It is not merely that the commissions are skewed in their composition in favor of liberal interest groups: They are more than willing to play politics in order to advance their political objectives, a fact that is ably demonstrated by the experience of the namesake of the Missouri Plan. Missouri is one of the states where the liberal state bar controls the selection of the commission.

For example, in 2008, the commission offered Missouri Republican Governor Matt Blunt three nominees: liberal Appeals Court Judge Lisa White Hardwick; former trial lawyer and Appeals Court Judge Ronald Holliger, who was nominated by the commission for a previous vacancy; and conservative Atchison County Associate Circuit Judge Zel Fischer, who Governor Blunt had already rejected for a lower judgeship. As noted by *The Wall Street Journal*, the panel was rigged to favor Hardwick, who happened to be a favorite of Chief Justice Laura Denvir Stith, a member of the nominating commission. "By nominating Zel Fischer as the conservative option, [the commission] dares Mr. Blunt to either select the less-qualified conservative judge, elevate Ms. Hardwick, or send the whole slate back, which means the commission then gets to make the pick."[22]

Merit Selection Is Undemocratic and Unaccountable

By rigging the rules of the game, the Missouri Plan creates a system whereby the role of the governor in selecting judges—a role through which the public could inject some indirect accountability—is often little more than a charade. If he finds the pool of candidates that he is offered to be unsatisfactory, the governor may not reject them and request another panel. In some states, if he refuses to choose from the list, the commission makes the selection on its own.[23] Thus, the public cannot rightly hold the governor accountable for his choice when the choice was essentially forced upon him, and they have no way of holding the unelected members of the commission accountable.

By rigging the rules of the game, the Missouri Plan creates a system whereby the role of the governor in selecting judges is often little more than a charade.

Not only is the governor's role in the selection process a sham, but so is the public's role. The "democratic" element of the commission model is said to be the retention election. To be sure, the public does have the ability to oust candidates who they believe to be unfit once they are selected; however, the cases in which judges have been rejected are extremely rare: Incumbents are retained 99 percent of the time in uncontested retention elections.[24] One study of state supreme court races over a 20-year period revealed that judges running in contested partisan elections were defeated 13 times as often as judges running in retention elections.[25]

Such statistics demonstrate the ineffectiveness of the retention elections. Professor Michael Dimino, a scholar and author of multiple articles on judicial selection, has pointed out three ways in which retention elections essentially serve to protect incumbents:[26]

20. Fitzpatrick, *supra* note 11.
21. *Id.*
22. Editorial, *Without Judicial Merit*, WALL ST. J., Aug. 23, 2008.
23. Ware, *supra* note 6, at n. 37; *See, e.g.*, MO. CONST. art. V, § 25(a); KAN. CONST. art. 3 § 5(b); OKLA. CONST. art. VII-B, § 4.
24. *See* Larry Aspin, *Trends in Judicial Retention Elections, 1964–1998*, JUDICATURE 79, 83 & n.1 (1999).
25. Fitzpatrick, *supra* note 11, at 684; *See* Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in RUNNING FOR JUDGE 165, 177 (Matthew Streb ed., 2007).
26. Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 807–08 (2004).

1. They minimize incentives for those who do not favor the incumbent to campaign against him because they cannot present an opponent to challenge him;
2. They eliminate partisan labels that are helpful to voters; and
3. Voters are less likely to oust the incumbent without knowing who his potential replacements are.

Thus, the high retention rates are likely a result of risk aversion or apathy rather than genuine approval of the judge. Professor Stephen Ware said it best when he wrote:

> In other words, retention elections are something of a fraud. They create a false veneer of democracy at the judicial retention stage that the bar can use to distract the populace from the elitism of bar power at the initial selection stage, which is where the real action is.[27]

Independence and Accountability: Not Mutually Exclusive

The debate over elections essentially comes down to the struggle between judicial independence and accountability. Yet this choice need not be mutually exclusive: There is a remedy in the judicial process for even the *appearance* of partiality by judges who have been elected.

The Supreme Court, in *Caperton v. A.T. Massey Coal Co.*,[28] found a due process right to seek recusal even in cases where a judge has not received a contribution but has only been the beneficiary of significant independent expenditures from a party appearing before that court. Interestingly, the *Caperton* court did not address the significant independent expenditures related to appointed judges that were made by advocacy groups seeking confirmation or rejection—expenditures that have been increasing right alongside expenditures for judicial elections and which would seem to create a similar appearance of potential bias. Thus, the argument that the election of judges undermines judicial independence is questionable at best.

Rather than moving away from elections, the public must be better educated about the role of the judiciary. The fact that the American people are not always informed about judicial elections is not a reason to disenfranchise them.

Yet the argument that accountability is at stake in the commission-style selection process is irrefutable. The public has absolutely no input into the initial selection process, and most of the time, their representatives have very little input. Those who do have input—the state bar and the laymen and lawyers who are selected to serve on the panel—cannot be "recalled" by the public or held accountable for their selection in any way. Further, as has been shown, the retention elections allow the public to oust the judge only with the risk of seeing him replaced by the same unaccountable commission with a judge who is equally unsatisfactory or worse.

Rather than moving away from elections, the public must be better educated about the role of the judiciary. The fact that the American people are not always informed about judicial elections is not a reason to disenfranchise them.[29]

Indeed, the success of the movement to disenfranchise the electorate through merit selection seems to rely, ironically enough, upon an uninformed electorate. Polling performed by the Polling Company for the Federalist Society shows that few voters understand how merit selection operates and that when they learn what it means, they strongly oppose it.[30] But there is hope: Many organizations have begun efforts to better educate the

27. Ware, *supra* note 6, at 771.

28. ___ U.S. ___ , 129 S.Ct. 2252 (2009).

29. Polling frequently shows that voters misunderstand issues and politicians, a fact lamented by both parties. Yet it seems that it is popular only in the realm of the judiciary to talk about removing an entire category of elected officials—one that greatly effects the voters—from the ballot.

public about state judicial candidates, and research shows a correlation between voter turnout and the availability of information about judicial candidates.[31]

The choice is clear. Clashing views about the proper role of judges—including the liberal perspective, which sees judges as simply political actors making preferred policy choices in robes—means that politics will be part of the judicial selection process unless and until judges return to simply applying the law as it is written. This nation thus can either allow the public to be involved in the selection process, continue educational campaigns on the role of the courts, and provide for some accountability for rogue judges or abandon the effort to educate the public altogether and keep the politics behind closed doors, dominated by liberal special-interest groups.

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30. For available polling, *see* The Polling Company, Topline Data, Statewide Survey of 500 High-Propensity Voters in Missouri (Feb.2007), http://www.fed-soc.org/docLib/20070324_missouripoll.pdf; The Polling Company, Topline Data, Survey of 600 Registered Voters in Kansas (Nov. 2007), http://www.fed-soc.org/docLib/20071129_kansaspoll.pdf; The Polling Company, Statewide Survey of 507 Registered Voters in Tennessee (Jan. 2008), http://www.fed-soc.org/docLib/20080226_TennesseeStatewideSurveyTopline.pdf; and The Polling Company, The Statewide Survey of Pennsylvania Voters (Oct. 6, 2009), http://www.fed-soc.org/doclib/20091006_PAPollOct09.pdf.

31. *See* Melinda Gann Hall, On the Cataclysm of Elections and Other Popular Anti-Democratic Myths 6 (Mar. 27, 2009) (unpublished working paper) *available at* http://ssrn.com/abstract=1394525. "In fact, the electorate is stimulated to vote in supreme court elections by the same factors that mobilize voters in non-judicial elections. Reduced to the most basic element, 'voters vote when they have interest, information, and choice.'" Melinda Gann Hall, *Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives*, 69 JOURNAL OF POLITICS 1147, 1151 (Nov. 2007).