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Building Support for Strong, Fair, and Impartial Courts[†]

MICHAEL A. WOLFF*

INTRODUCTION

State courts are vulnerable to political pressure. Judges in most states are subject to election and their budgets are subject to approval by the executive and legislative branches. In many states, the courts' constitutional structure and authority can be changed through the referendum and initiative processes.

One hundred years after Roscoe Pound's famous speech, "The Causes of Popular Dissatisfaction with the Administration of Justice,"¹ parts of the speech still sound contemporary. One of Pound's targets was the election of judges. In 1906, about eighty percent of state court judges were elected; today, the number is close to ninety percent, including judges who are subject to retention elections.²

Through judicial elections and the legislative process, courts are involved in politics. This is discomfiting. The court system's challenge is to maintain its integrity as the third branch of government. We need to insulate courts as best we can from political pressures that may affect—or give the perception of affecting—judicial decisions. Supporters are essential.

Unpopular decisions—even by federal courts or courts in other states—can be the focal point of anger that is used to drive turnout in judicial elections, either primarily to defeat a sitting judge or to bring out the angry voters for other purposes, or both.

I. THE POLITICAL MARKETPLACE

In the political process, especially as it plays out in state capitols, there are three commodities: money for campaigns, blocs of votes, and information. Judges are poor lobbyists. In this political marketplace, courts have no interest group constituency, they do not contribute financially to political campaigns, and the only information they have is about how they operate.

As long as courts are subject to the political marketplace, they need supporters from across the political spectrum—even those ordinarily opposed to one another—who possess the commodities that are valuable in this political marketplace. It is a delicate balance, however; courts must provide information about the values of strong court systems to these political players while remaining free from any undue influence on the courts' decision-making process.

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1. 29 A.B.A Rep. 395 (1906), *reprinted in* Proceedings Honoring Roscoe Pound, 35 F.R.D. 241, 273 (1964).

2. David Rottman, Chantal Bromage, Michael Zose & Bryan Thompson, Nat'l Ctr. For State Courts, *Judicial Selection 101: What Differs and What Matters*, COURT STATISTICS PROJECT: CASELOAD HIGHLIGHTS, Oct. 2006, at 1, 1, *available at* www.ncsconline.org/D_Research/csp/Highlights/Vol13No2.pdf.

This balance can be maintained by engaging the diverse consumers of court services, at least those who have respect for the courts' decision-making processes. On the one hand, some of those who come before courts are large corporations with vast financial resources to spend in the political arena, while on the other hand, many more who come before courts are members of labor unions, environmental groups, senior citizen groups, women's voting groups and others who have influence through large voting blocs. All of these groups—large or small, liberal or conservative—should have a common interest in ensuring competent and efficient judges and court staff, in making sure courts have adequate resources, and in protecting the courts' ability to render fair and impartial judgments.

In Missouri, the courts have been fortunate to have found support from diverse groups, including various segments of the bar, from civic leaders and from the business community. For instance, corporations that do business throughout the United States as well as in other countries have come to understand what is at stake. They want to know that the judges are competent, not corrupt, and will rule promptly. One supporter is the general counsel of a company headquartered in rural Missouri that has manufacturing plants in twenty countries around the world. When his company considers locating in a country, the court system is one of the major factors that the company considers as part of its economic decision whether or not to locate there. He most assuredly does not want Missouri to have a Third World judiciary. This is the message that business leaders have conveyed to legislative leaders in support of Missouri's courts.

These valued judicial characteristics—competent judges, adequate resources, and the ability to render consistent, fair, and impartial judgments, free from undue political influence—are the same characteristics that we Americans hold up as exemplary when working with other countries that are looking to improve their court systems.

Business leaders—as well as labor leaders and other consumers of the courts' system—are natural allies in much the same way members of the legal profession are. Their help, I believe, can be accepted without undue concern for making a Faustian bargain. Businesses, labor groups, environmental groups, consumer groups and other citizen groups have lobbyists. Their political action committees help bring legislators and other elected officials to the governmental dance. Their lobbyists are heard, because, as the political adage goes, "you dance with the one that brung you."

II. COURTS AS PROVIDERS OF INFORMATION

When an influential legislator says that he does not care that proposed cuts in the judiciary's budget would slow the courts down because he does not like what the courts do anyway, who is best positioned to give an answer? Judges certainly can do so, but are they the most effective? Lobbyists for other interests often are better messengers than judges.

There is a shocking amount of misinformation among legislators about the courts. For example, when Missouri's general assembly was considering "tort reform" legislation in 2005, some legislators said they thought that torts were mostly what courts do. That information simply was incorrect; most of the cases that Missouri's trial courts hear instead involve contract disputes and landlord-tenant disputes and the

like. The personal injury cases and wrongful death cases on which the legislators had focused their “tort reform” efforts comprise fewer than three percent of our cases.³

To respond to this misinformation, we produced a “Basic Facts” brochure that provided accurate caseload information for various categories of cases as well as a description of the court system. We distributed this pocket-sized brochure not only to every member of the general assembly but also to our state’s judges for use when they speak about the court system with citizens in their local communities.

III. COURTS AS CONSTITUENTS

Judges do not have much influence in the halls of the capitol. They are most effective—and essential—at the local level. Many judges invite local legislators to their courthouses and show them how the courts operate. In this way, courts and judges can be seen as constituents and as fellow public servants working on behalf of the legislators’ other constituents. By contrast, when judges show up in the capitol, they are seen as supplicants—just one of many special interest pleaders. And in the political-governmental marketplace, judges have nothing they can ethically trade.

Courts and judges have another set of allies—the majority of the public. Judges and court staff frequently are invited to speak with a variety of school and civic groups. In Missouri, we encourage this sort of interaction—and civic education—throughout the year and not just on Constitution Day. People trust what they understand, and they better understand their government when they have the opportunity to see it in action or to meet its leaders.

When the Harris Poll recently asked whom the public trusts, judges received a seventy percent positive rating. That compares with twenty-seven percent for lawyers and thirty-five percent for members of Congress.⁴ People may view their own representatives or lawyers differently, because they have personal interaction with those individuals. But as a group, I believe judges are rated in part based on how the public feels about the direction of the country generally.

In the sixty-six-year history of Missouri’s nonpartisan court plan,⁵ voters have favored retention by substantial margins, but the results tend to vary with the economy and the voters’ perceptions of incumbents generally.⁶ No appellate judges have been

3. See SUPREME COURT OF MISSOURI, MISSOURI JUDICIARY: BASIC FACTS (2006).

4. Harris Interactive, *The Harris Poll #61: Doctors and Teachers Most Trusted Among 22 Occupations and Professions: Fewer Adults Trust the President to Tell the Truth*, Aug. 8, 2006, http://www.harrisinteractive.com/harris_poll/index.asp?PID=688.

5. The nonpartisan court plan features a nominating commission for appellate courts that consists of three lay persons appointed by the governor for six-year staggered terms, three lawyers elected by the Bar from three geographic districts, and the chief justice. The plan also covers the metropolitan area counties of St. Louis, Jackson (Kansas City), Clay and Platte Counties and the city of St. Louis, with separate smaller commissions for each of these counties. In Missouri’s remaining 110 counties, judges are elected in partisan elections. MO. CONST. art. V, §§ 25, 27.

6. Jay A. 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, 320–21 (1997). Two circuit judges have lost retention votes, one in 1942 and the other in 1992. The issues in these retention elections did not involve particular rulings but rather issues related to the overall perception of the judges’ performance in office. Charles B. Blackmar, “*The Missouri*

turned out of office, but in 1990 the percentage of votes for retention fell into the mid-to-low fifty-percent range.⁷

The votes to retain incumbents in retention elections may be interpreted a number of ways, and I will not explore them here except to observe that judges who stand for retention have been screened and nominated by nonpartisan nominating commissions. This process affords a review of qualifications for competence and character that the contested-election political process often does not. It should not be surprising that judges screened for competence and character by independent commissions find favor with the majority of voters.

The downturn in retention percentages in 1990 prompted some lawyers to form, in 1992, a political action committee called Citizens for Missouri Courts, which raised money and conducted a radio advertising campaign urging voters to find out about judges and not to vote against them without knowing why. Retention percentages generally rose to above sixty percent and have remained there ever since.⁸

IV. TARGETING A JUDGE

The first organized campaign against a Supreme Court of Missouri judge came in the seventeen days immediately before the 2004 election, when my colleague Richard Teitelman was the target of a campaign focusing on the issues of gay marriage, abortion, and the death penalty.⁹ The campaign involved automated phone calls recorded by a well-known conservative activist, a website called Missourians Against Liberal Judges, and other related activities. Supporters of Teitelman and of the Missouri nonpartisan court plan countered with their own campaign, consisting mainly of automated phone calls by a former United States attorney, newspaper advertisements and radio advertising. Many of the state's newspapers also wrote editorials denouncing the anti-Teitelman efforts. Teitelman's retention percentage was 62.3% positive; he received the largest number of "yes" votes and the largest number of "no" votes in history.¹⁰

The apparent targeting of the anti-Teitelman campaign to the state's most conservative voters suggests that one of the main purposes was turnout—to encourage angry voters to come to the polls. Once there, those voters presumably would vote for conservative candidates.

Plan" from 1940–2006, 72 MO. L. REV. (forthcoming 2007).

7. Blackmar, *supra* note 6.

8. See Larry Aspin, *Judicial Retention Election Trends 1964–2006*, 90 JUDICATURE 208, 209 tbl. 1 (2007), available at http://www.ajs.org/ajs/publications/Judicature_PDFs/905/aspin_905.pdf; Official Election Returns, Missouri Supreme Court Election, Nov. 29, 2006, available at <http://www.sos.mo.gov/enrweb/raceresults.asp?eid=189&oid=43318&arc=>.

9. On the issues, the campaign against Teitelman did not let the facts stand in the way of a good story line.

10. In the 2004 general election, there were 2,731,364 votes cast for President, Official Election Returns, U.S. President and Vice President Election, Dec. 1, 2004, available at <http://www.sos.mo.gov/enrweb/raceresults.asp?eid=131&oid=33035&arc=1>; about a half million fewer votes were cast in the Supreme Court retention election, Official Election Returns, Missouri Supreme Court Election, Dec. 1, 2004, available at <http://www.sos.mo.gov/enrweb/raceresults.asp?eid=131&oid=32993&arc=1>. Judge Teitelman received 1,370,825 "yes" votes and 829,254 "no" votes. *Id.*

The speaker of the House of Representatives, a political conservative, was involved in the anti-Teitelman campaign. There was, however, a post-campaign rapprochement that was nothing short of remarkable. Shortly after the election, one of my colleagues on the Supreme Court hosted a small dinner at his home. He invited the speaker and some of the Supreme Court judges, including Teitelman. A newspaper reporter who wrote an article about the dinner quoted the speaker: "It was very gracious of Judge Teitelman to be there. He was wonderfully kind and very interesting to talk to. . . . My respect for the judge went up a ton that evening."¹¹

This rapprochement for the past two sessions of the general assembly has been reinforced by members of the business community, consumer organizations, civic organizations, and the legal profession. The Missouri Judicial Conference, the organization of all the state's judges, has given awards to the speaker in 2005 and 2006 for his support of efforts on behalf of the judiciary.

V. SEEING THE UGLY ALTERNATIVE

Another event in 2004 shored up support for the Missouri nonpartisan court plan among leaders of the various groups that rely on Missouri courts for fair and impartial judgments—a contested election for a seat on the Illinois Supreme Court. The contested seat was in southwestern Illinois, where the major media market is St. Louis. Everyone in eastern Missouri watched a multimillion dollar campaign that was conducted largely on St. Louis television. Much of the advertising, especially ads by non-candidate interest groups, was negative.¹²

11. Tim O'Neil, *Republican Lawmakers Look to Alter High Court*, ST. LOUIS POST-DISPATCH, Dec. 20, 2004, at A1.

12. Professor Roy Schotland's comments on the aftermath of the Illinois election provide a dire warning:

The election winner, Judge Lloyd Karmeier, had raised US \$4.8 million, including direct contributions of US \$350,000 from State Farm employees and lawyers; in addition, a group funded by persons connected with State Farm had raised US \$1.2 million, all but US \$500 of which it contributed to Karmeier. Others affiliated with State Farm, or directly interested in the outcome of the case, contributed substantial additional sums. The contributions to Karmeier's opponent's campaign, albeit from different sources, showed a similar pattern. After Karmeier was elected, the St. Louis Post-Dispatch, which had previously endorsed him, editorialised: 'Big business won a nice return on a US \$4.3 million investment in Tuesday's election. It now has a friendly Justice . . . And anyone who believes in even-handed justice should be appalled at the spectacle.'

When Karmeier did not withdraw from the pending State Farm case, plaintiffs filed a motion for his withdrawal. State Farm opposed, arguing that the facts shown did not require recusal. The full court denied the motion on the ground that it was up to Karmeier, who then declined to withdraw. In August 2005, with Karmeier participating, that court unanimously (one justice not participating for unrelated reasons) reversed US \$600 million in punitive damages, and by a majority of 4-2—with Karmeier in the majority—also reversed the award of a further US \$457 million. The US Supreme Court denied the plaintiffs' petition for review of Karmeier's participation.

....

The message of the Illinois campaign to citizens on our side of the Mississippi River was clear: if Missouri abolishes the nonpartisan court plan, this is what we will have.¹³ Since 2004, longstanding efforts in the general assembly to approve constitutional amendments to abolish the nonpartisan court plan have gone into remission, at least for the time being.¹⁴

When one bad idea goes into remission, others arise to take its place. Various proposals to require senate confirmation of nonpartisan plan judges, proposals to make impeachments into political trials, and—from other states—proposals for term limits, recall elections and so forth.

What these proposals have in common is to throw courts into the political cauldron—a position largely antithetical to the courts' duty to render judgments that are consistent with the law and the constitution, regardless of popular opinion. Just as fundamentally—and of great concern to consumers of court services—is that these various measures inevitably will discourage able lawyers at the peak of their careers from seeking judicial office. What successful lawyer wishes to give up a good practice, at the peak of his or her career, for a position subject to political termination for doing one's job?¹⁵

VI. ENGAGING THE PUBLIC

Certainly courts need assistance from citizens and various groups with political clout in fending off constitutional changes that would weaken the courts' ability to perform their essential role in our republic. Just as importantly, those of us in the court system should examine our own strengths and needs and, where possible, make changes that enhance our ability to perform this role.

One recent effort to examine the strengths and needs of the judiciary is worthy of note. The American Bar Association Standing Committee on Judicial Independence this past year conducted a study of the Missouri courts, called a state court assessment. This evaluation of Missouri's courts used the criteria developed by the American Bar Association when advising judicial systems in other countries about what constitutes an adequate and effective judiciary. The assessment included in-depth interviews with

... [A]fter the Karmeier election, an Illinois poll in 2005 showed that over 87 percent of voters believed that contributions influence decisions to some degree at least; only 52 percent think that judges are 'fair and impartial.'

Roy A. Schotland, *Judicial Elections in the United States: Is Corruption an Issue?*, in TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS 26, 27–28, 29 (2007) (first omission in original).

13. As Indiana Chief Justice Randall Shepard has commented: "No good comes from fostering judicial food fights at the ballot box." Tony Mauro, *Chief Justices Sound Alarm on Judicial Elections*, LEGAL TIMES, Aug. 21, 2006, at 8.

14. Earlier efforts to eliminate the Missouri plan are reported in Daugherty, *supra* note 6.

15. The same might be said for judges elected in partisan races or who accept appointment to a partisan vacancy after assessing the electoral prospects for keeping the position at the next election. Judges who face opponents, however, often have a more direct connection with their local voters than do Supreme Court judges, who are on the statewide ballot, or appellate judges, who are on the ballot in one of three districts, or even judges from metropolitan counties who face retention. Judges selected under the nonpartisan court plan face a greater political challenge than do judges elected in contested races because they are, for the most part, unknown to their larger electorates and, unless challenged, do not campaign for office.

civic leaders, political leaders, journalists, bar leaders, and others about their perceptions of the strengths and needs of the Missouri judiciary. This report is a strong foundation for strategic planning—that is, to begin with an assessment of the needs of the judiciary, and then go forward with a strategy for taking proactive measures for improvement.¹⁶

Most of the needs of the judiciary in Missouri that the ABA committee's assessment identified are related to resources and the constraints on obtaining adequate resources through the political process. Missouri, like many states, has a constitution that is readily subject to amendments. It is just as important for us to think about statutory and constitutional changes that will enhance the judicial role and keep the correct balance of power among the three branches of government as it is to counter measures that would weaken the judiciary.

To keep the court system strong, we also must enhance our ability to communicate with the public regarding the courts' essential functions. My optimistic belief is that the public understands, in a fundamental if unarticulated way, the checks and balances that are central to our democratic system.

There is much to be done to educate the public. The Missouri Bar, which is an integrated, or mandatory, bar, has excellent civic education programs for schools. These programs help judges and lawyers become more and more engaged in efforts to reach school children. I also write a monthly column that the Missouri Press Association distributes to all of the state's newspapers.¹⁷ However, our efforts are constrained by our professional roles.

VII. LETTING OTHERS LEAD

I have noted my belief that judges are poor lobbyists. I would add another weakness: judges are not good at accepting help and letting others take charge. Judges, by and large, are successful people, and they generally did not get that way by letting others take the lead. But accepting offers of help and letting others take the lead is essential to preserving the judicial role that is perceived as nonaligned with special interests and able to render impartial judgments.

When judges stand back and let the smart citizens around them take the lead, good things can happen. For example, for many years an organization centered in the Kansas City area, Missouri Institute for Justice, has been active in promoting understanding of the Missouri nonpartisan court plan. Voluntary bar associations throughout the state engage in civic education activities. Recently we have been told that certain community leaders are forming an organization called the Missouri Law Institute, a not-for-profit organization that will engage in various civic education activities. Its organizers say it will be an umbrella organization that will consist of broad-based representatives of

16. STATE COURT ASSESSMENT PROJECT, STANDING COMM. ON JUDICIAL INDEPENDENCE, AM. BAR ASS'N, *THE MISSOURI COURT SYSTEM: AN ASSESSMENT* (2006), available at <http://www.abanet.org/judind/scap/missouri.pdf>.

17. These columns are available on the Missouri Courts Web site. Missouri Courts, Chief Justice Columns, <http://www.courts.mo.gov/page.asp?id=1074> (last visited Mar. 12, 2007). The Missouri Bar's educational programs are described on its Web site, www.mobar.org (follow "Educators" hyperlink).

business, labor, civic groups, and the bar to promote educating the public about the role of courts and the rule of law.

Regardless of the type of organization and the manner in which it carries out its mission, all these civic education activities are much-needed components for building public support for a strong judiciary.

VIII. PROTECTING THE THIRD BRANCH

These efforts will help ensure the structural integrity of the third branch of government. They are matters of concern for all lawyers. They have little to do with protecting incumbent judges, or, indeed, engaging the political process on behalf of the judiciary in any way other than protecting the constitutional role of the courts.

There can be—and probably should be—differences of opinion within the bar on particular matters relating to the courts, as to their effectiveness, as to the nature and outcomes of their decisions, and as to how judges are selected and retained in office. Integrated bars, such as The Missouri Bar, avoid political controversies, but there is no need for any such group to avoid controversies related to the fundamental structure and function of the third branch of government itself.

I believe it is important for bar leaders to continue to look for new ways to advance their efforts to protect the structural integrity of the courts from attacks in the form of constitutional amendments, whether through legislatively generated referenda or through petition initiatives. It would be worthwhile for bar leaders to establish a fund, separate from the court or bar structure, which would be available for efforts to protect the structural integrity of the courts from such attacks on their constitutional structures. Such a fund also might be available to advance proposals that put before the voters constitutional propositions that would appropriately strengthen the third branch of government and keep our system of checks and balances stable.

The threats to the structure and strength of the judicial branch present big challenges, but I believe that the public, when properly informed, understands and appreciates the value of a fair, impartial, and effective court system. What sometimes is lacking is the means and ability to communicate effectively with the public on an ongoing basis and to engage the public in a timely fashion when the structure of the judiciary is attacked.

We should operate on the assumption that there always will be some dissatisfaction with the administration of justice. That inheres in the nature of what courts do. But we need a broad strategic vision that encompasses accepting support of those civic-minded members of our communities who share the belief that courts must be protected against undue political influence so that judges are able to follow the law, uphold the constitution, and make decisions that are fair and impartial.

To do so requires us to recognize the commodities that others possess in the political marketplace—money, voting blocs, and information—and to be unafraid to accept their support without giving anything in exchange, except a commitment to fair and impartial justice competently and promptly delivered. To preserve essential judicial independence, we recognize a certain degree of interdependence with those who share our belief in the rule of law. This is an ongoing balancing act upon which the health of our democratic republic depends.