

TO: Interested Parties

FROM: Kellyanne Conway  
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**the polling company™, inc.**

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RE: Missouri: Survey Analyses

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A recent survey conducted by Public Opinion Strategies (POS) on behalf of Justice at Stake, Missouri Institute for Justice, and Missourians for Fair and Impartial Courts (JAS/MIJ/MFIC) regarding the Missouri Plan – the system of judicial selection in Missouri – purports to show widespread support for and satisfaction with the plan. Two previous polls conducted for **The Federalist Society** by **the polling company™, inc. (tpc)**, demonstrated something different – a lack of knowledge about the system of selection and a clear unhappiness with the status quo.

The following memo explains some of the differences in the way the two polls were conducted and suggests reasons why the results may vary. This is not meant to be a critique of this survey generally or to completely dismiss their findings, but rather to point out where certain phraseologies and methodological decisions could have led to findings that were not as representative of the Missouri public as some claim.

*First, a few methodological concerns:*

- ✓ The JAS/MIJ/MFIC survey lacks a disclosure of regional breakdowns. In the survey conducted by tpc, where a person lived had a definite impact on how he or she felt. If survey respondents in the JAS/MIJ/MFIC poll were not properly sampled according to the residency of Missouri voters, the results could be skewed.
- ✓ The age distribution in the JAS/MIJ/MFIC poll appears to rely too heavily on older voters (29% are 65+ while 18-24 year olds only comprised 2% and 25-34 year olds only comprised 8% of the responses). According to 2004 exit polls in the state footnote, 18-29 year olds comprised 20% of people who actually voted.
- ✓ The political approvals calculated in the JAS/MIJ/MFIC survey appear to contrast significantly compared to other surveys. For example, Governor Blunt's favorable rating varies dramatically compared to other statewide surveys. A Research 2000 poll conducted in mid-November for the St. Louis *Post-Dispatch* and KMOV-TV of 800 likely voters, for example, showed Governor Blunt's approval rating was 40%, compared to the 53% calculated in the JAS/MIJ/MFIC survey.

*The most important differences between the two polls emerge in exactly how the questions are asked and the language used (and in the case of JAS/MIJ/MFIC omitted) to describe the current system of judicial selection.*

- **The description of the selection process in the JAS/MIJ/MFIC fails to fully describe the extent to which the State Bar is involved in the process (it imply says “citizens and attorneys”), seems to overstate the role of the Governor, and uses buzz words such as “nonpartisan” all of which likely lead to the higher support.**
- **It also glosses over the true nature of retention elections and makes it seem as though voters are principally in charge of who sits on the bench.**
- **In addition, this question is asked after a series of questions explaining to voters the ways in which Supreme Court Judges are “held accountable for their court decisions.” Respondents are basically being told in the survey how great their current system is, then asked to evaluate it. To get a true read on their support of the current system, this question should have come much earlier in the survey and contained additional information.**
- **Finally, this description made no mention of the Chief Justice’s role on the selection committee, which the Fed Soc poll shows, voters reject.**

**JAS/MIJ/MFIC Survey:**

Q16. Now, I have a few questions about how some Missouri's judges are selected. First, under the current system, a nonpartisan panel of citizens and attorneys selected by the Governor, the state bar association and the Supreme Court evaluate and recommend potential judges to the governor. The governor then chooses a new judge from the recommended list. After a short initial term, the public then votes on whether the judge should keep the seat or be removed from office. If a judge is rejected by the voters, the selection process starts again. Based on this statement, do you support or oppose this existing system?

<b>71%</b>	<b>TOTAL SUPPORT</b>
29%	STRONGLY SUPPORT
42%	SOMEWHAT SUPPORT
12%	SOMEWHAT OPPOSE
14%	STRONGLY OPPOSE
<b>26%</b>	<b>TOTAL OPPOSE</b>
3%	DON'T KNOW
1%	REFUSED

***The Federalist Society Survey (August 2007)***

Q6. As you may know, there are seven Judges on the Missouri Supreme Court who are appointed by a process known as the “Missouri Plan.” Under this plan, the Appellate Judicial Commission selects all the judicial nominees for the Supreme Court. The Commission is a seven-member group comprised of the Chief Justice of the Missouri Supreme Court, three members of the general public selected by a past or the present Governor, and three lawyers selected by the Missouri Bar, an association of lawyers in Missouri. Each member of the Commission serves a six-year term. The Commission selects three applicants from which the Governor must choose when there is an opening on the Supreme Court.

Were you aware that the Missouri Bar Association, the statewide association of lawyers, selects three out of the seven people that serve on the Appellate Judicial Commission which selects all of the Missouri Supreme Court nominees?

10% YES  
87% NO  
  
2% DON’T KNOW (VOLUNTEERED)  
- REFUSED (VOLUNTEERED)

**Chief Justice’s Role In Selecting New Justices Viewed Skeptically by Voters.**

*After learning that the sitting Chief Justice of the Missouri Supreme Court played an active role in selecting incoming judges, a majority (54%) of voters deemed this “improper.” This agreement was shared equally by Republicans, Independents, and Democrats (all 54%).*

Q7. I am now going to read you the opinions of two people regarding this process. Please tell me which one comes closest to your view. (ROTATED)

Person 1 says it is proper for the Chief Justice of the Missouri Supreme Court to be one of the people picking the other judges on the Supreme Court because the Chief Justice knows what it takes to be a good judge based on years of experience and the new judge will be independent once seated on the Court and will not be pressured to rule the same way as the Chief Justice in future cases.

Person 2 says that it is improper for the Chief Justice of the Missouri Supreme Court to be one of the people picking the other judges on the Supreme Court because the Chief Justice will be the new judge’s colleague and that might cause or appear to cause the new judge to feel pressure to vote the same way as the Chief Justice in future cases.

**41% TOTAL PERSON 1 (NET)**  
18% STRONGLY AGREE PERSON 1  
23% SOMEWHAT AGREE PERSON 1  
  
**54% TOTAL PERSON 2 (NET)**  
27% SOMEWHAT AGREE PERSON 2  
27% STRONGLY AGREE PERSON 2  
  
4% DON’T KNOW (VOLUNTEERED)  
- REFUSED (VOLUNTEERED)

- The questions addressing the proposals for change in the JAS/MIJ/MFIC poll do not present respondents with the option for minor or less dramatic changes. Each proposal involves a large and absolute change rather than a more realistic “tweak” to better the current system.
- In addition, the strong opposition to each of these three proposals clearly indicates that Missourians WANT to play a role in the selection process (as shown in the Fed Soc poll). Unfortunately, the JAS/MIJ/MFIC survey never asks them how they feel about the number of citizens who actually sit on the nominating commission and their level of input.

**JAS/MIJ/MFIC Survey:**

Next, I’m going to read you a few proposals which may be considered by the legislature to change how some Missouri judges are selected. For each one, please tell me whether you would favor or oppose each proposal (Qs 17-19).

- ✓ “Ending judicial retention elections and allowing the legislature to vote on keeping or rejecting judges instead.”
- ✓ “Replacing the current evaluation process with a new system where judges are chosen by the governor and confirmed by the state Senate.”
- ✓ “Abolishing the commission which recommends judges and allowing the governor to choose his/her own judicial nominee.”

**The Federalist Society Survey (August 2007)**

**By More Than Two-to-One, Voters Advocate a More Diverse Supreme Court Selection Committee.**

*Sixty-five percent of voters surveyed supported changing the balance of power of the Appellate Judicial Commission as other states have done. Once again, there was tri-partisan agreement as at least 61% of all members of all three parties took this position. Just one-quarter of respondents (25%) opposed such a shift.*

Q11. A number of states have adopted the same process of selecting judicial nominees as Missouri; however, most of them have a judicial nominating commission that includes more input from the Governor, state legislature, citizens, and other interested parties and less input from lawyers and state bar associations. Do you support or oppose changing the way Missouri selects the members of its Commission as other states have? And would that be strongly or somewhat support/oppose change?

**65% TOTAL SUPPORT (NET)**

25% STRONGLY SUPPORT  
40% SOMEWHAT SUPPORT

**25% TOTAL OPPOSE (NET)**

17% SOMEWHAT OPPOSE  
8% STRONGLY OPPOSE  
5% NEED MORE INFORMATION/ NO BASIS TO JUDGE (VOL.)  
6% DON’T KNOW/UNSURE (VOLUNTEERED)  
\* REFUSED (VOLUNTEERED)

## Veto Power: Missourians Declare Governor Should NOT be Restricted to AJC's First Three Nominees.

*By a margin of nearly two-to-one, voters imbued their chief executive with the power to decline the three Supreme Court applicants presented by the Appellate Judicial Commission and “ask for new nominees.” Sixty percent of voters felt the governor should have this authority while only 33% believed he or she should be “required to select from the three names provided.” Furthermore, no less than 56% of members of all political parties agreed that the AJC should not be able to dictate to the governor who sits on the State Supreme Court.*

Q14. If the Governor of Missouri does not think any of the three applicants that the commission selects are qualified, do you think that (ROTATED) he should be able to decline those options and ask for new nominees OR should he be required to select from the three names provided?

- 60% HE SHOULD DECLINE THOSE OPTIONS AND ASK FOR NEW NOMINEES
- 33% HE SHOULD FOLLOW THE COMMISSION'S RECOMMENDATIONS AND BE REQUIRED TO SELECT FROM THE THREE NAMES PROVIDED
- 6% DO NOT KNOW (VOLUNTEERED)
- 1% REFUSED (VOLUNTEERED)

- **A question in the JAS/MIJ/MFIC survey that claims to show people want an “independent” judiciary is incomplete and the conclusion drawn from it inaccurate. The question asks about to whom or what Justices should be “accountable to” without explaining what exactly that means. One might assume it means their decisions would be reviewed or rejected by the Governor or Legislature. It does not ask about whether those selecting the Justices should be accountable to the public – which the Federalist Society poll shows support for (albeit, tempered support until people learn more).**

### JAS/MIJ/MFIC Survey:

Q12. Please tell me which statement you agree with more:

- 22% Missouri judges should be accountable to elected officials like the Governor and the legislature to ensure judges are responsive to the needs of the public.  
...OR...
- 73% Missouri judges should be independent of elected officials like the Governor and the legislature to ensure judges make decisions based only on the law and the Constitution.
- 1% NEITHER
- 3% DON'T KNOW
- \* REFUSED

***The Federalist Society Survey (August 2007)***

**Voters Prefer a Chain of Command In Judicial Selection that Considers their Interests.**

*In another evaluation of the current State Supreme Court selection process, Missouri voters narrowly sided with an argument calling for the majority of members of the Appellate Judicial Commission to be directly answerable to voters. Exactly one-half (50%) thought it best for at least four of the seven member committee be appointed by elected officials in order to ensure accountability to the electorate. On the other hand, 45% worried that this might taint the process with partisan politics.*

*Voters were truly conflicted by this choice – more than six-in-ten placed themselves in the middling “somewhat” categories – indicating greater education and message points on the issue are warranted.*

Q9. I am going to read you the opinions of two people regarding this process. Please tell me which one comes closest to your view. (ROTATED)

PERSON 1: It is best that the deciding majority, meaning at least four of the seven members, of the nominating commission consist of people not accountable to the voters of Missouri because we want the judicial selection process to be insulated from the political process.

PERSON 2: It is best that the deciding majority, meaning at least four of the seven members, of the nominating commission be appointed by elected political officials because we want the judicial selection process to be accountable to the people of Missouri.

(AND WOULD THAT BE STRONGLY OR SOMEWHAT AGREE WITH PERSON 1/2?)

**45% TOTAL PERSON 1 (NET)**

17% STRONGLY AGREE PERSON 1  
28% SOMEWHAT AGREE PERSON 1

**50% TOTAL PERSON 2 (NET)**

31% SOMEWHAT AGREE PERSON 2  
19% STRONGLY AGREE PERSON 2

4% DON'T KNOW (VOLUNTEERED)

\* REFUSED (VOLUNTEERED)

- The JAS/MIJ/MFIC Survey purports (or presumes) that voters are very knowledgeable about their highest court but does not properly ask a question to solicit that information. Asking one to assess his level of knowledge of what courts and judges *do* in Missouri is much different from asking *how familiar* one is with the Supreme Court's rulings. Most people know that courts rule on cases and issue opinions/sentences. The Fed Soc poll also shows that only 39% of voters even know how Justices come to serve.

**JAS/MIJ/MFIC Survey**

Q8. First, how much would you say you know about what courts and judges do in Missouri?

<b>60%</b>	<b>TOTAL GREAT DEAL/SOME</b>
12%	A GREAT DEAL
48%	SOME
31%	LITTLE
8%	NOTHING AT ALL
<b>39%</b>	<b>TOTAL LITTLE/NOTHING</b>
1%	DON'T KNOW
–	REFUSED

**The Federalist Society Survey (August 2007)**

**State Supreme Court Selection Process Cloaked in Mystery.**

*Two separate survey questions gauged respondent's knowledge of the process to seat judges on Missouri's State Supreme Court – and both revealed a major knowledge gap. This widespread lack of knowledge stretched across all demographic groups. Further, an eye-popping 83% were unaware of the make-up of the state's Appellate Judicial Commission.*

Q1. How familiar would you say you are with the Missouri State Supreme Court and its rulings and decisions? Are you... (READ AND ROTATED TOP TO BOTTOM AND BOTTOM TO TOP)

<b>43%</b>	<b>TOTAL FAMILIAR (NET)</b>
5%	VERY FAMILIAR
38%	SOMEWHAT FAMILIAR
<b>56%</b>	<b>TOTAL NOT FAMILIAR (NET)</b>
36%	JUST A LITTLE BIT FAMILIAR
20%	NOT AT ALL FAMILIAR
1%	DO NOT KNOW (VOLUNTEERED)
-	REFUSED (VOLUNTEERED)

Q2. Which of the following do you think best describes how Judges are **first** chosen to serve on the Missouri Supreme Court? [READ AND ROTATED]

- 47% JUDGES ARE APPOINTED BY THE GOVERNOR OF MISSOURI AND CONFIRMED BY THE LEGISLATURE
- 39% JUDGES ARE NOMINATED BY A JUDICIAL COMMISSION AND APPOINTED BY THE GOVERNOR (ASKED Q3)
- 1% OTHER (VOLUNTEERED)
- 12% DO NOT KNOW (VOLUNTEERED)
- \* REFUSED (VOLUNTEERED)

- **The JAS/MIJ/MFIC interpretation of the “most important issues” question as a way to show how unimportant the issue is cynical and insulting to the voters, misstating the value Missourians might place on changing the judicial selection process by comparing its primacy to other statewide matters as education and health care.**

Just because only 5% of Missourians said that one of their top two issues was changing the way judges are selected does not mean that 95% of Missourians deem the issue to be unimportant or unworthy of consideration. It is true that the majority of Missourians have little, if any, interaction with the State Supreme Court, but that does not mean that most Missourians see it as having a minimal role in the function and maintenance of society.

- **Finally, the JAS/MIJ/MFIC poll concludes that, “the judicial selection process is NOT broken, so don’t fix it,”** yet favorability for the Court stands at just 48%, slightly below the governor and the state legislature and well below the U.S. Supreme Court.

In conclusion, it seems that the survey conducted by Justice in Stake, Missouri Institute for Justice, and Missourians for Fair and Impartial Courts left out vital pieces of information that are critical to allowing voters the opportunity to render their true opinions on the issue of judicial selection. Most apparently, their description of the current process was incomplete and inaccurate, suggesting the conclusion drawn from it is also unusable. In contrast, the survey conducted on behalf of The Federalist Society presented voters with specific details and several arguments both for and against the current system and truly allowed voters to weigh these competing interests, and express their feelings on the subject.