The Missouri Non-Partisan Court Plan: Assessing the Summer 2007 Appellate Judicial Commission Process for Judicial Appointment to the Supreme Court of Missouri.

Introduction.

Over the past year, there has been much debate over whether to amend Missouri's process for selecting judges, known as the Missouri Non-Partisan Court Plan or the "Missouri Plan." Proponents of reform have argued for hearings open to the public and legislative input into the appointment process. Those who oppose updating the Missouri Plan have cited three principal reasons that the Missouri Plan is the best from amongst many plans: (1) the plan is non-partisan, (2) it is based on merit, i.e., pure credentials, and (3) the sitting Governor receives three nominees who are philosophically in-line with the then Governor or at least from the same political party.[1] On May 18, 2007, Judge Ronnie White of the Supreme Court of Missouri announced his retirement from the court, thereby drawing into clear focus the failures and successes of the Missouri Plan.[2] This announcement triggered the process whereby the three theoretical assumptions upon which the Missouri Plan is based would be put to the practical test.

Whether the Missouri Plan is better in theory than in execution, or whether the Summer 2007 Appellate Judicial Commission (the "Commission") properly executed the plan, are legitimate questions to debate.[3]

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[1] *See* Missouri Bar Association, *Talking Points on the Missouri Non-Partisan Court Plan, available at* http://www.mobar.org/98e76450-6e72-4a9b-90c7-839112db40d1.aspx. *See also* Terry Ganey, *Blunt Judges the Judges,* COLUMBIA DAILY TRIBUNE, Aug. 5, 2007, *at* http://www.columbiatribune.com/2007/Aug/20070805Feat004.asp *and* Missouri House of Representatives, Summary of the Committee Version of the Bill HJR 31, 94th General Assembly *available at* http://www.house.mo.gov/bills071/bilsum/commit/sHJR31C.htm. "Those who oppose [the Federal Model for appointment] say that the Missouri Nonpartisan Court Plan is a bipartisan model that has a moderating effect on our state courts. The process for judge selection is a rigorous one. The commission charged with the selection of judges is representative of Missouri and thoroughly checks the judicial candidates." *Id.* At this point, it should be noted, that the "thorough check of the judicial candidates" as applied in practice by the Summer 2007 Appellate Judicial Commission consisted of half hour interviews with each candidate.

[2] Chris King, *A Diversity of Thought*, ST. LOUIS AMERICAN, July 18, 2007, *available at* http://www.stlamerican.com/articles/2007/07/19/news/local_news/localnews01.txt ("There are still four Democratic appointees," White said. "The court is in good shape.") After the Commission nominated two Democrats and just one Republican, the defenders of the Missouri Plan began the outrageous propagandizing that once a person becomes an appellate judge they cease to identify with Republican or Democrat ideals that they carried to that point (though they presumably vote and do so based on ideas advocated by some party). See, e.g., Virginia Young, *Judicial Activists, There's No Sign*, ST. LOUIS POST DISPATCH, August 12, 2007, *available at* http://www.stltoday.com/stltoday/news/stories.nsf/missouristatenews/story/647D7FBBC2D78A7886257334000E52D5?OpenDocument

[3] Questions surrounding whether the Missouri Plan should be updated are not new. *See, e.g.*, Richard A. Watson, *Lawyer Attitudes on Judicial Selection*, 1965 AM. J. SOC, at 373, 384 n.43 (1965) ("disagreements with its alleged negative features, namely, substituting bar and gubernatorial politics for party and machine politics . . . ." *See also*, Hon. Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315 (1997) (hereinafter Dougherty, *Dinosaur on the Edge*) ("If Public knowledge and trust in courts erodes, the result may be new and varied challenges against non-partisan merit selection plans, with outcries from the legislature and the public to repudiate such plans and return the judiciary to partisan politics.")

A February statewide Missouri poll of voters indicated that two-thirds of Missourians preferred the current process to be changed.[4] Assuming the reader concludes that the Missouri Plan failed to meet the assumptions underlying its premise once it was actually applied, it can be expected that the debate in the coming legislative session will not be whether to change the appointment method. Instead, the debate will center on how much of the checks and balances and public input should be restored to judicial appointments and removed from the control of the Bar association and an unelected, unaccountable Commission.

The purpose of this paper is to review the theory and assumptions about the Missouri Plan as applied by the Summer 2007 Commission. The philosophy of the judges appointed to the state's highest court has consequences: lasting societal implications in everything from criminal law to private contracts and especially tort law. According to a recently published paper on the contemporary history of the Missouri Supreme Court, from 1992 to 2002, jurists espousing principles of judicial restraint comprised a majority of the Supreme Court. Following twelve years of Democrat governors Carnahan and Holden, in 2002, with the appointment of Judge Teitelman, the Carnahan-Holden Supreme Court majority:

> "modified Missouri tort law to relax the causation requirement, and takes a more liberal approach to federal and state constitutional law. The court exhibits less deference to the legislature and to precedent, and has expanded Missouri's venue rules and statute of limitations while relaxing traditional contract law. The current court is also more willing to overturn death sentences for ineffective assistance of counsel and for lack of a fair trial caused by pre-trial publicity, and to overturn other criminal convictions for insufficient evidence."[5]

And frequently over dissents by Governor Ashcroft Appointees Judges Limbaugh, Price and Benton.[6]

In 2004, Missourians elected Republican Matt Blunt as Governor. Governor Blunt repeatedly stressed that he would expect the Commission to deliver to him three candidates that espoused the principles of judicial restraint, would not "legislate from the bench," and rejected an activist court philosophy.[7] Just days before the applications for replacement of Judge White were due, Missouri rotated its Chief Justice position from Michael Wolff to Laura Denvir-Stith.

Missouri's newest Chief Justice claimed not to understand the meaning of the common term "judicial activism" or what it meant to legislate from the bench.[8] Given the overwhelming discussion of judicial

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[4] *See* http://www.fed-soc.org/doclib/20070324_missouripoll.pdf

[5] William Eckhardt and John Hilton, Esq., "*The Consequences of Judicial Selection: A Review of the Supreme Court of Missouri, 1992-2007*," http://www.fed-soc.org/publications/pubID.356 /pub_detail.asp. [hereinafter *Judicial Selection Consequences*] at 21.

[6] *Id*. at 14.

[7] *See,* Press Release, Governor Matt Blunt, "Blunt Outlines Importance of Qualified Judges Who Will Not Legislate From the Bench (June 21, 2007) *available at* http://www.gov.mo.gov/press ("The governor today asked the [Commission] to respect Missouri voters by presenting a slate of nominees who would dutifully interpret Missouri law without regard to their own policy preferences. The governor also supported efforts this legislative session to provide Missouri voters the opportunity to prevent activist judges from imposing taxation without representation.") *See also*, Press Release, Governor Matt Blunt, Gov. Matt Blunt Statement on Supreme Court Judge Ronnie White's Retirement Announcement (May 18, 2007) *at* http://www.gov.mo.gov/press/Judge White051807.htm.

[8] Bob Priddy, *Supreme Court: Administration of the Stith*, MISSOURINET, June 27, 2007, *at* http://www.missourinet.com/gestalt/go.cfm?objectid=6F75E426-9E0A-DF68-55DE319193E682FD. According to Judge Stith:

activism and judicial restraint beginning with the famous case of *Marbury v. Madison* in 1803, and continuing through Judge Bork's groundbreaking and best selling book "Tempting of America" in 1990,[9] Justice Stith's claim of ignorance was literally incredible.[10] Especially so, since less than one year ago, many people who are not judges, much less on the state's highest court, could still recall the explanation of judicial activism by Chief Justice Roberts of the U.S. Supreme Court in his now famous analogy: a judge is like an umpire applying the rules laid out in the rule book by those responsible for making the rules [i.e., the legislature] – an activist umpire is one who makes up new rules outside of the rule book or applies the rules in a way never intended by those who wrote the rule book. The new Missouri Chief

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> I'm looking for judges who can judge fairly and honestly, not bring personal views, views of others, views of interest groups, concerns about public reaction to their decisions. … I'm looking for judges who will judge honestly and fairly and based on the law and fact. The judge is not going to decide on personal predilection. If that's what the governor means, then we're in agreement. I'm not really sure what the term "activist" means. It would be hard for me to comment more specifically. This is not a legal term. I'm not sure it has a static definition.

Jason Rosenbaum, *Judge on high court discounts 'activism,'* COLUMBIA DAILY TRIBUNE, June 28, 2007, at http://www.columbiatribune.com/2007/Jun/20070628News004.asp. Compare Judge Stith's claim that judicial "activism" is not a "legal term" with the Black's Law Dictionary definition:

> a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.

BLACK'S LAW DICTIONARY 862 (8th ed. 1999).

[9] ROBERT H. BORK, TEMPTING OF AMERICA (1990). "The heresy, which dislocates the constitutional system, is that the ratifiers' original understanding of what the Constitution means is no longer of controlling, or perhaps of any, importance. . . . The result is a belief . . . that judges may create new principles or destroy old ones, thus altering the principles actually to be found in the Constitution. Courts then not only share the legislative power of Congress and the state legislatures, in violation of both the separation of powers and of federalism, but assume a legislative power that is actually superior to that of any legislature." *Id.* at 6-7.

[10] As explained by Chief Justice John Roberts of the U.S. Supreme Court, on August 2nd, 2006, in his 84 page response to the Questionnaire by the Senate Judiciary Committee,

> "Thoughtful critics of 'judicial activism' – such as Justices Holmes, Frankfurter, Jackson and Harlan – always recognized that judicial vigilance in upholding constitutional rights was in no sense improper 'activism.' It is not 'judicial activism' when the courts carry out their constitutionally-assigned function and overturn a decision of the Executive or Legislature in the course of adjudicating a case or controversy properly before the courts. . . . It is not part of the judicial function to make the law – a responsibility vested in the Legislature – or to execute the law – a responsibility vested in the Executive. As Marshall wrote in [1803 in] his most famous opinion, however, '[it] is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison* 1 Cranch 137, 177 (1803). . . . The proper exercise of the judicial role in our constitutional system requires a degree of institutional and personal modesty and humility. . . . [J]udges must be constantly aware that their role, while important, is limited. They do not have a commission to solve society's problems, as they see them, but simply to decide cases before them according to the rule of law. When the other branches of government exceed their constitutionally mandated limits, the courts can act to confine them to the proper bounds. It is judicial self-restraint, however, that confines judges to their proper constitutional responsibilities."

See Judge John Roberts, Written Response to the Written Questions of the Senate Judiciary Committee, Response # 28 at page 66, *available at* http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/supreme_court_watch/RobertsQuestions2.pdf.

Justice, as Chair of the Commission that would select the next judge of Missouri's highest court, having claimed ignorance of judicial activism, sent the first signal that the Commission was headed down a potentially destructive path.

After reviewing all thirty applicants in just two days (giving an appallingly scant half hour interview for each applicant to the Supreme Court), the Commission forwarded three nominees to the Governor for his consideration.[11] Two of the three were Democrats and one was a Republican. In and beyond Missouri, it is a political truism that a governor of one party, Democrat or Republican, will be loathed to appoint a person from the opposite party to the highest court. In Missouri, it has not happened in the last half century, and the last time a Governor of one party was implicitly forced to appoint a judge from the other party was nearly three decades ago during Governor Kit Bond's administration. Operating under this truism, after the Commission nominated two Democrats and one Republican, even the most generous interpretation is that the Commission had gamed the system by de facto making the choice of judge. During twelve years of Democrat Governors, in five instances of the Commission nominating a person for the Supreme Court, *not once was any one of the three nominees a Republican*. (*See*, Appendix 3.)

Republicans were not alone in being upset with the commission. A well known commentator and an admittedly "card carrying member of the ACLU" reacted that the Commission had gamed the system and the Missouri Plan needed to be changed before it was gamed again.[12] Putting the best face on the Commission's action, the Governor vowed to conduct an exhaustive review of the candidates.[13]

As will be explained in great detail in the section *Past as Prelude*, one cannot conclude that any of the three nominees adhere to the philosophy of judicial restraint. Indeed, it would be reasonable to conclude that none of the three nominees would differ in any meaningful way from the Carnahan-Holden Democrat appointed Supreme Court majority. To put this differently, while the Commission was well aware of the elected Governor's preference of judicial temperament and certainly his Republican political affiliation, it nominated three persons who seem to fit the philosophical preference of the previous Democrat Governors. And, the one Republican nominated voted with Justice Stith, the Chair of the Commission, *100% of the time* while the two served on the appellate court together.

How this first ever affront by a Commission to a sitting Governor will play out over the coming months will be closely watched by many. As discussed in detail below, there are beatings of lawsuits over the

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[11] *See supra* Note 2. Statement of the Missouri Bar and defenders of the Missouri Plan in the Testimony against adoption of HJR 31. "The process for selecting judges is a *rigorous one*." *Id.* (emphasis added.)

[12] Bill McClellan, *Nonpartisan Court Plan May Not Be So Nonpartisan*, ST. LOUIS POST DISPATCH, July 27, 2007. [hereinafter *Not So Nonpartisan*]. In contrast, former Chief Justice Edward "Chip" Robertson has vigorously defended the plan. Mr. Robertson, appointed to the court at the age of 33 by a Republican governor after having served as that governor's Chief of Staff, had little legal experience and no judicial experience. In reaction to Mr. Robertson's appointment Democrats decried what was accurately described as a flawed process for selecting judges.

[13] Press release, Governor Matt Blunt, Governor's Office Continues Supreme Court Panel Review with Expansive Questionnaire (Aug. 2, 2007) *available at* http://www.gov.mo.gov/cgibin/coranto/viewnews.cgi?id=EElypZpyVZzCwFsFUq&style=Default+News+Style&tmpl=newsitem. The questions are based on those given by the Democrat controlled Senate Judiciary Committee to Harriet Miers. *See* Virginia Young, *So You Want to be a Supreme Court Justice,* ST. LOUIS POST DISPATCH, August 3, 2007, *available at* http://www.stltoday.com/stltoday/news/stories.nsf/missouristatenews/story/48DBD68FDA66946F8625732C000E878E?OpenDocument. *See also* Judge John Roberts, Written Response to the Written Questions of the Senate Judiciary Committee, Response, signed August 1, 2006, *available at* http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/supreme_ court_watch/RobertsQuestions1.pdf

Commission's alleged violation of the Missouri Sunshine Law. Additionally, genuine Fourteenth Amendment issues have been raised over the composition of the Commission, which includes three persons who are elected only by members of the Missouri Bar and office holders must be members of the Missouri Bar. Should one of the nominees withdraw from consideration, the Commission would have to select another panel of three. The Governor still holds the option of not choosing any of the three nominees and actively campaigning against that judge's retention in the next election. Suffice it to say that the Missouri Nonpartisan Court Plan, already under attack, may have seen its deathblow delivered by the Commission when, led by the newly appointed Chief Justice of the Missouri Supreme Court, it gamed the system in its July 2007 meetings.

Theory of the Missouri Nonpartisan Court Plan.

Vacancies on the Supreme Court and courts of appeal, as well as the trial courts in the counties of Clay, Jackson, Platte and St. Louis and the City of St. Louis, are filled under the framework of the so-called "Nonpartisan Court Plan."[14] Judicial elections occur in the trial courts in approximately 100 other counties in Missouri. The public body which appoints Missouri's Appellate and Supreme Court judges is a seven member board called the "Appellate Judicial Commission" (hereafter, the "Commission"). For the trial courts, a five person public board operates in a similar manner.

The seven member commission is comprised of the Chair, who is the Chief Justice of the Supreme Court[15]; three persons elected by members of the Missouri Bar, an association of Missouri lawyers; and, three non-lawyers appointed to staggered six year terms such that a governor must typically serve two terms before he or she gets more than one appointment to the seven member Commission.[16] In summary, the Chair, herself a member of the Missouri Bar, and three other members of the Missouri Bar, control a majority of the Commission.

Applicants for a vacant seat on Missouri's seven member Supreme Court are given approximately one month to submit an application, the Summer 2007 application containing twenty-four questions and up to six letters containing references.[17] (The names of the applicants are to be kept from the public under a

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[14] MO. CONST. art. V, sec. 25 (a):

> "Whenever a vacancy shall occur in the office of judge of any of the following courts of this state, to wit: The Supreme Court, the court of appeals, or in the office of circuit or associate circuit judge within the city of St. Louis and Jackson County, the governor shall fill such vacancy by appointing one of three persons possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided. If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy."

[15] The Chief Justice Chairs the Commission even when appointing a member to her own court. In contrast, Judges Price and Russell recused themselves from the highly publicized and political Missouri Voter I.D. case, *Weinschenk et al. v. State of Missouri*, because a former member of the Supreme Court was arguing the case before the court. It is perhaps a mere coincidence that both judges were subject to retention election the following month. The lone dissenter from the court's majority opinion which threw out Missouri's requirement for publicly funded voter identification went on to achieve retention by a substantial margin.

[16] The staggered six-year terms are not part of the Missouri Constitution. Rather, the staggered terms were created by Missouri Supreme Court Rule 10.03 in 1972.

[17] A copy of the application is available at: http://www.courts.mo.gov/page.asp?id=6051.

1972 Court Rule[18] that purportedly takes precedence over Missouri's Sunshine Law adopted in 1973 and requiring meetings of public bodies to be open to the press and public.)[19]

The Commission is then given time to review the applications and also interview the applicants. The Commission must thereafter forward to the Governor, for his or her consideration, the names of three nominees to the Supreme Court or courts of appeal. The Governor may within sixty days choose one of the nominees. The Governor may make such inquiry of the nominees as he or she deems appropriate. If the Governor does not make a selection within sixty days, the Commission chooses one of the three nominees. Within one year, the judge appointed must face a retention election. And the judge must face a non-partisan retention election once every twelve years thereafter.

No Supreme Court or court of appeal judge has ever lost a retention election in the history of the Missouri Plan. Only three circuit judges have ever lost a retention election, with one being under indictment at the time. A thirty year study of the retention elections in states having some form of the Missouri Plan shows that 1.3% of judges lost a retention election between 1964 and 1994, with less than one half of one percent in the period 1984-1994.[20] Disturbingly, voter roll-off, i.e., those that skip the part of the ballot containing the retention of judges, is 35%.[21] Simple math dictates that in order to obtain a simple majority of votes in an election a judge must secure at least 77% of the vote when roll-off is 35%. Not one single judge in the 2006 retention election received 77% of the vote. Put differently, assuming an average of 35% voter roll-off, not one judge received a majority of votes of those voting. Under such a scenario, it is proper to question whether a retention election is an appropriate mechanism or a mere charade of political checks and public accountability.

Missouri adopted its plan for appointing judges in 1940 in response to an abuse of the elective system of judges by the Democrat Political machines of St. Louis City Ward bosses and the Democrats in Kansas City led by the notorious Pendergast machine putting forth only their selected candidates on the ballot. The Missouri Plan was based on a concept articulated by Albert Kales in 1913[22] arising from a movement against judicial elections started in 1906 and best set forth in a speech "*The Causes of Popular Dissatisfaction with the Administration of Justice*" by Roscoe Pound (later to be U.S. Supreme Court Justice).[23] Missouri was the first state to adopt the Kales Plan and thus the birth of the eponym the "Missouri Plan."

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[18] Missouri Supreme Court Rule 10.28.

[19] Notably, Missouri's Sunshine Law did not except from its provisions the Appellate Judicial Commission. As discussed herein, there have been calls or the Missouri Attorney General to enforce the Sunshine Law.

[20] Larry Aspin, William K. Hall, Jean Bax & Celeste Montoya, *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 8-9 (2000) ("Numerous studies have found the majority of retention voters have little knowledge of the judge let alone specifics of courtroom behavior. The uninformed voter's retention vote, rather than being a function of knowledge of the judge, is more often a function of variables over which the judge has little influence . . ."). *Id*. at 14.

[21] *Id*. at 12-13. ("One of the first observed characteristics of retention elections was their high rolloffs – in some states rolloff is regularly near 50%. [S]ome question how much public accountability is being achieved when rolloffs are so high.") *Id*. at 12.

[22] Missouri Bar Association, *History of the Non-Partisan Court Plan*, *at* http://www.mobar.org/81a9785d-c049-411d-bdd5-816ffe26a2a6.aspx.

[23] Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, *at* http://www.answers.com/topic/the-causes-of-popular-dissatisfaction-with-the-administration-of-justice?cat=biz-fin. See also, Daugherty, *Dinosaur on the Edge* at 317-318.

Twenty-nine states adopted *a form of* the Missouri Plan where a nominating commission make recommendations to the Governor.[24] To be clear, the Plan in effect in Missouri, is a "form of" but has the least amount of public accountability and legislative oversight of the variants to the Missouri Plan. Since originally adopting the Missouri Plan, fifteen states have gone on to update their judicial appointment process to make it more representative. Indiana, Iowa, Kansas, Nebraska and Wyoming are the only states that retain the form of the Missouri Plan currently used in Missouri. The Missouri Bar continues to obfuscate by claiming thirty states have "some form of the" Missouri Plan. The Accountable Commission Plan, discussed below is a "form of" the Missouri Plan. The Missouri Bar and the Judicial Commission oppose that improvement of the system as well.

The twin but opposing goals of any judicial system in a Republic are independence and accountability.[25] The best balance is in the middle. On a sliding scale of public input into the judicial selection system with direct elections being the most public input and the Missouri Plan being the very least public input, it is easy to see that Missouri has been left behind. *See* Appendix 1.

The Missouri Plan in Practice in the Summer of 2007.

Even advocates for the theory of the Missouri Plan conceded that the Summer 2007 Commission, controlled by Democrats and replacing Democrat Ronnie White, inserted partisan politics into their selections and failed the Plan.[26] As stated by Ronnie White on his retirement with the thought that a Republican would replace him, "There are still four Democratic appointees. The court is in good shape."[27] On the other hand, those that benefited from the Plan in the past lauded its performance.[28] Despite its underlying theory, the Missouri Plan has failed to keep politics out of the selection process. But the Summer 2007 Commission and the Democrats controlling the Commission are not alone in failure. In 1985 Democrats were crying foul over Republican Governor Ashcroft appointing under the "Nonpartisan Merit Plan" his then thirty-three year old Chief of Staff to the Supreme Court. With an outstanding academic career but relatively short eight years as a lawyer, and no judicial experience, calls for reform from Democrats were loud and aggressive.[29]

While politics will always be part of any political appointment process, there is abundant evidence that the Missouri Nonpartisan Merit Plan has manifested partisan politics behind closed doors in the past decade. It is hard to reconcile "nonpartisan" with the application of the Plan given the statements of the retiring Supreme Court judge, that the immediate past Chief Justice was a Chief Counsel to a Democrat Governor and had no judicial experience before being appointed, and the Chief Justice before that had served six years in the Missouri House of Representatives and was Chair of its Judiciary Committee having served less than one year in the judiciary.

The Call for Applicants and the List Becomes Public.

As set forth above, the Supreme Court created a Rule that allegedly pre-empted both the First Amendment's guarantee of freedom of the press as well as the Missouri Sunshine Law. In an open

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[24] Stephen B. Presser, et al., *Judicial Selection White Papers: The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353 (2002).
[25] *Id*. at 6.
[26] *Not So Nonpartisan*, supra note 13.
[27] See supra, note 2.
[28] Ganey, supra note 1 ("I'm involved in it because I'm a product of the Plan," said [former Missouri Supreme Court Judge Chip] Robertson).
[29] *Id*. "After Robertson was named to the Supreme Court in 1985, an interim legislative committee took a look at the plan." *Id*.

inquiry the Supreme Court refused to publicize the names of the applicants. Nevertheless, the names of thirty applicants were distributed on the Internet within days of the application period being closed. The list was circulating widely in St. Louis and Kansas City law firms. In a clear violation of the Rule the Supreme Court used to refuse public access to the list of applicants, it was rumored that the Supreme Court itself circulated the list of applicants to numerous non-Commissioners. An editorial in a leading Missouri publication called for the Attorney General to investigate, the Governor to refrain from taking action, and the Chief Justice to start the process anew.[30]

Amongst the thirty applicants were extraordinarily qualified men and women, a number of which seemed to have a shared judicial philosophy with the Governor. Of the two Democrats and one Republican that that were eventually nominated by the Commission, Judge Nanette Baker, a female African-American who spent just three years on the Court of Appeals, had the lowest Bar rating of the five Supreme Court and appellate judges in the previous retention election[31] and in the bottom 20% of all judges on the Supreme Court, Eastern District Court of Appeals and the Circuit Courts in St. Louis City and County.[32] Exemplifying the mysterious decision making process used by the Commission, compare Judge Baker's nomination to an applicant who did not make the panel, Judge Lisa White Hardwick, a female African-American with more judicial experience than Judge Baker, and who distinguished herself at the University of Missouri and later at Harvard Law School. On the merits and on paper, while Judge Baker may be more than capable, it would seem that Judge Hardwick would be a superior "merit" candidate for Missouri's Nonpartisan Merit Selection Plan. Since the Commission met in secret for half-hour interviews and came to its recommendation a day later,[33] it is up to the Commission to explain how Missouri's Nonpartisan Merit Selection Plan lived up to its name.

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[30] Editorial page, *Start Over in Selecting a New Judge*, SPRINGFIELD NEWS LEADER, Aug. 3, 2007 ("Frankly, it shouldn't come to Blunt asking Nixon to enforce the law. New Supreme Court Chief Justice Laura Denvir Stith herself should reverse the commission's actions, repost the meetings and start all over again, in full accordance with the law. And if she doesn't, Nixon should compel her to do so. And finally, if that doesn't happen, Blunt should make it clear that he will not move forward until the Sunshine Law is followed.")

[31] *See* http://www.mobar.org/data/judges06/ed.pdf. Judge Baker's 2006 retention election Bar rating of 73% is substantially lower than current Missouri Supreme Court judges: Limbaugh 90%; Price 93% and Russell 91% and lower than her colleague on the Eastern District Court of Appeals Kenneth Romines 85%. Of all judges up for retention in 2006 in the Missouri Supreme Court, Eastern District Court of Appeals and the Circuit Courts of St. Louis City and St. Louis County, Judge Baker ranked in the bottom twenty percent in Bar ratings.

[32] *Id.*

[33] Thirty-minute interviews for jobs of any kind would seem to be extraordinarily rare. One would think that an interview for a Missouri Supreme Court position might be a bit more demanding. Compare, for example, the statements by the Missouri Bar and those opposed to adoption of HJR 31, the federal model, where the defenders of the Missouri Plan reinforced the "bipartisan nature of the commission" and how "the process for judge selection is a rigorous one." That lofty goal of rigorous examination could not have been performed by the Commission from an objective view of the timelines. To the end of a vigorous review, Missouri's Governor submitted a list of 111 questions to the applicants based on questions submitted (publicly) to Harriet Miers in her nomination for the U.S. Supreme Court.

Past as Prelude: A Review of the Judicial Decisions of the Three Nominees.

The purpose of this portion of the paper is to provide a brief background of the three nominees and to determine the likely consequences of their appointment to the Supreme Court. The analysis rests on the presumption that the best way to gauge future conduct is by examining past rulings. Thus, the conclusions rest on that body of rulings in which each of the three nominees has participated, and directs the determination of the type of judge one could expect each of them to be. The hope is that an objective inquiry into each nominee's record will serve as a valuable contribution to the ongoing debate, and will provide Missourians with the information they need to arrive at a well-reasoned conclusion.

Biographies and Background

Judge Breckenridge

Judge Patricia Breckenridge is a graduate of the University of Missouri-Columbia, where she received a Bachelor of Science degree and a law degree. She was appointed in 1982 by Governor Bond as an associate circuit judge in Vernon County in the 28th Judicial Circuit. She was thereafter elected to that position three times. In 1990, Governor Ashcroft appointed Judge Breckenridge to the Missouri Court of Appeals for the Western District of Missouri. She was retained in that office in 1992 and again in 2004.

By the time she was appointed to the Court of Appeals, the formation of the Ashcroft Court at the Supreme Court of Missouri was well under way. Three of the high court's seven judges were Ashcroft appointees at that time, and within two years of her appointment all seven judges on that court would be Ashcroft appointments. Simply stated, the importance of the judiciary increased significantly during these years, and the qualifications and judicial philosophy of the individuals selected to fill judicial vacancies became more important than ever.

Judge Breckenridge was appointed during the ascendancy of the Ashcroft Court, when Governor Ashcroft was appointing judges most observers regarded as conservative. Accordingly, one could have expected Judge Breckenridge to fit the mold of Governor Ashcroft's Supreme Court appointments and, as they were expected to do, to issue "increasingly conservative court rulings: longer prison sentences, shorter reviews of death penalty cases, smaller jury awards in civil cases and unsympathetic attitudes towards lifestyles differing from the traditional family."[34]

The following survey of Judge Breckenridge's cases, however, demonstrates that she does not fit that mold. If Judge Breckenridge were appointed to the Supreme Court of Missouri, and history is any indicator of future performance, it is reasonable to expect Judge Breckenridge to follow the current majority on the Supreme Court of Missouri and reverse some of the important legal steps taken during the years of the Ashcroft Court, particularly in the area of criminal law.

This is not to say that Judge Breckenridge's record reveals an agenda that is aggressively opposed to the Ashcroft Court, but it is to say that, at least in some areas, and especially criminal law, Judge Breckenridge's judicial philosophy is simply incongruent with the direction the Ashcroft Court took. Further, a Westlaw survey of her entire tenure on the Court of Appeals, spanning sixteen years, reveals that Judge Breckenridge dissented just over a dozen times and never dissented in a case where Judge Stith wrote for the majority.

The lack of dissent should not be taken as conclusive evidence of Judge Breckenridge's likelihood to rule with the current majority, as the Court of Appeals is a busier court that sits on smaller "panels" of three judges and promoting compromise. But it is at least a leading indicator that, in contrast to Judges Limbaugh or Price, Judge Breckenridge is unlikely to hold a hand up to stop the ever increasing liberalization of the Missouri Supreme Court and is likely to increase it in criminal law.

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[34] William C. Lhotka, *Benchmark: Ashcroft Appointees Ensure Judicial Legacy*, ST. LOUIS POST DISPATCH, May 26, 1991.

Judge Holliger

Judge Ronald Holliger is a native of Kansas City and received a Bachelor of Science degree and a law degree from the University of Missouri-Kansas City. After graduating from law school, Judge Holliger entered the private practice of law before being appointed by Governor Carnahan to serve on the Jackson County Circuit Court in 1995. In 2000, Governor Holden appointed Judge Holliger to the Western District Court of Appeals.

Judge Holliger's first appointment came by Governor Carnahan in the same year that Governor Carnahan appointed Judge Ronnie White to the Supreme Court. Judge White's appointment signaled the beginning of the end for the Ashcroft Court and, by extension, the beginning of a movement away from the jurisprudence of restraint that characterized that court. Thus, if the temporal relationship between Judge Holliger's appointment and Judge White's appointment matters, one would be reasonable to expect Judge Holliger's record to resemble Judge White's. Judge Holliger's subsequent appointment by Governor Holden makes this expectation even more reasonable. And, as demonstrated by our review of Judge Holliger's record, and the following survey of his cases, Judge Holliger is indeed philosophically aligned with the more liberal Carnahan-Holden court. While not having as many seemingly criminal defendant friendly decisions, Judge Holliger is by no stretch of the imagination strictly applying constitutional principles in criminal cases or providing trial courts with deference in the adjudication of criminal matters. Judge Holliger is not likely to stand athwart the Carnahan-Holden majorities actions to ever more liberalize criminal law.

Judge Baker

Judge Nannette A. Baker received her Bachelor of Science degree from the University of Tennessee-Knoxville and is a graduate of the St. Louis University School of Law. She was a circuit judge for the City of St. Louis from 1999-2004, after serving on the Board of Election Commissioners and engaging in private practice for two St. Louis plaintiffs law firms for several years. She was appointed to the Eastern District Court of Appeals in 2004 and has served on that court through 2007.

It is worth noting that, while Judge Baker has participated in over five hundred opinions during her three year tenure on the Court of Appeals, she has authored only about thirty opinions. While we have endeavored to base our conclusions primarily on her writings, the scant amount of her written opinions has forced us to base our conclusions at least as much on opinions in which she has concurred as those which she has personally authored. Judge Baker's jurisprudence has—and would continue—to represent a departure from the legal philosophy that prevailed on the Ashcroft Court.

Criminal Law

Perhaps the most discernable change on the Supreme Court of Missouri since the end of the Ashcroft Court has been in the area of criminal law. New appointments to the Supreme Court can have a dramatic effect on the face and evolution of criminal law in this state simply because criminal appeals comprise a disproportionately large part of the court's workload. Further, the next appointment will be replacing Judge White who, from his earliest days on the court, has been a fierce opponent of the direction taken by the Ashcroft Court in criminal matters. And on the current majority, Judge White's departure represents the loss of a reliable fourth liberal vote in criminal cases. Thus, it is possible for the next appointment to the Supreme Court to alter the balance of power in criminal cases for many years.

The current majority is far more likely to relax Missouri's post-conviction relief rules, to overturn death sentences for ineffective assistance of counsel, and to overturn other criminal convictions based on evidentiary challenges brought by the defendant.[35] One especially notable case from the current majority

[35] *Judicial Selection Consequences*, supra note 6. *See also* Bullard v. State, 853 S.W.2d 921 (Mo. banc 1993) (all concur); White v. State, 939 S.W.2d 887 (Mo. banc 1997) (6-1 decision) (White, J. dissenting);

is *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003), wherein Justice Stith wrote for the court and held that execution of individuals under eighteen years of age at the time of their capital crimes is prohibited by the Eighth Amendment.

Justice Stith exhibited judicial activism by acknowledging and then dismissing recent precedent from the U.S. Supreme Court and by going so far as to cite non-binding international standards in her opinion. These steps were eventually noted by several Justices on the U.S. Supreme Court, and particularly Justice Sandra Day O'Connor, who blasted Justice Stith for ignoring earlier and binding pronouncements of the nation's highest court and finding new Constitutional rights based on current values.[36]

To cite three other notable examples, in *State v. Seibert*, 93 S.W.3d 700 (Mo. banc 2002) the defendant was arrested for an arson that resulted in a death and confessed before being read her Miranda rights. The defendant again confessed after being Mirandized. In a split opinion, the Missouri Supreme Court held that conducting an interrogation both before and after a Miranda warning weakens a defendant's ability to exercise her right against self-incrimination. Hence, the court ruled that in this case neither confession would be allowed. Also, in *State v. Long*, 140 S.W.3d 27 (Mo. banc 2004), in another split opinion, the court granted a new trial to a defendant who was not allowed to introduce evidence of a rape victim's previous false accusations, notwithstanding that the defendant chose not to cross-examine the victim during trial.

More recently, in the July case of *Glass v. State*, a 4-3 split court reversed a jury verdict for the death penalty in a case involving a pedophile who had kidnapped, beaten, raped and eventually strangled a thirteen year old girl to death. Factually, the case presented one of the most brutal murders the Supreme Court has heard. As the dissent made clear, the reasoning the majority employed to reverse the verdict was based purely on policy preference against the death penalty, in even the most heinous crimes, despite the fact that Missourians have refused to abolish the death penalty.[37] While one may agree or disagree with the death penalty, it is beyond question that Missourians have not amended their constitution to get rid of it.

Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000) (5-2 decision) (White, J., dissenting); State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. Banc 2003) (4-3 decision) (Benton and Price, JJ., dissenting). *Compare* State v. Johnson, 968 S.W.2d 123 (Mo. banc 1998) (6-1 decision) (White, J., dissenting), *with* Hutchinson v. State, 150 S.W.3d 292 (Mo. banc 2004) (5-2 decision) (Limbaugh, J., dissenting on ineffective assistance of counsel issue), State v. Whalen, 49 S.W.3d 181 (Mo. banc 2001) (4-3 decision) (Price, J., dissenting), State v. Langdon, 110 S.W.3d 807 (Mo. banc 2003) (5-2 decision) (Limbaugh, J., dissenting), State v. Self, 155 S.W.3d 756 (Mo. banc 2005) (5-2 decision) (Price, J., dissenting on sufficiency of the evidence issue).

[36] Justice O'Connor stated in her dissent:

> As a preliminary matter, I take issue with the Court's failure to reprove, or even to acknowledge, the Supreme Court of Missouri's unabashed refusal to follow our controlling decision in Stanford. The lower court concluded that, despite Stanford's clear holding and historical recency, our decision was no longer binding authority because it was premised on what the court deemed an obsolete assessment of contemporary values. Quite apart from the merits of the constitutional question, this was clear error.

Roper v. Simmons, 543 U.S. 551, 593-594, 125 S.Ct. 1183,1209 (U.S. 2005) (O'Connor, J., dissenting).

[37] *See* Glass v. State, 2007 WL 1953413 (Mo. banc 2007). *See also* State v. Glass, 136 S.W.3d 496 (Mo. banc 2004).

Judge Breckenridge

Because Justice Stith's arrival on the Supreme Court has been particularly instrumental to the ongoing shift away from the Ashcroft Court in criminal cases, it is particularly useful to know how Judge Breckenridge and Justice Stith interacted during their years of concurrent service on the Court of Appeals.

To that end, an exhaustive search of opinions authored by Justice Stith during years of contemporaneous service with Judge Breckenridge showed that Judge Breckenridge aligned herself with Justice Stith 100% of the time. (The two judges concurred in each of the fifty one cases authored by Judge Stith.)

In conjunction with her strong tendency to agree with Justice Stith, the following survey of cases leads to the reasonable conclusion that Breckenridge's appointment would signal an even stronger shift towards the further liberalization of criminal law. Judge Breckenridge's strongest influence in the area of criminal law has been in cases involving searches and seizures and Missouri's drug laws. Her rulings demonstrate a tendency to apply standards of review differently depending on whether the state or the defendant is appealing, in addition to a tendency to disfavor the State's claims in cases where evidence is sought to be excluded.[38]

In reviewing a trial court's ruling on a motion to suppress, the evidence and all reasonable inferences are viewed in the light most favorable to the trial court's ruling and deference is given to the trial court's factual findings and credibility determinations. Simply stated, the ruling of the trial court, whether for the State or for the defendant, is owed a great degree of deference on appeal.

In keeping with that standard, when faced with an appeal by a criminal defendant to a circuit court's denial of a motion to suppress or other motion to exclude evidence, Judge Breckenridge frequently, and in relatively long opinions, sidesteps the standard of deference afforded the trial court. Similarly, when the circuit court's decision has been to grant the prosecutors motion to allow challenged evidence, she has applied the standard of review with great scrutiny so as to invalidate the conviction.

For instance, in *State v. Slavin*, 944 S.W.2d 314 (Mo. App. 1997), a law enforcement officer stopped the defendant for a routine traffic violation. After stopping him, the officer noticed that the defendant was extremely nervous and that he was traveling from one coast of the country to the other. Based on these facts the officer concluded that there was objective reasonable suspicion that criminal activity was afoot. The officer searched the car, finding between 80 and 100 pounds of marijuana in the trunk. He was thereafter tried and convicted.

On appeal the defendant claimed that the officer did not have the requisite level of suspicion to search his car and that the trial court erred in overruling his motion to suppress evidence of the marijuana. Though the standard of review in such a case required the appellate judge to review the facts and the evidence in the light most favorable to the trial court's ruling, as stated above, Judge Breckenridge proceeded to second-guess nearly every one of the trial court's judgments on the facts. In sum, Judge Breckenridge disregarded the officer's reasons for suspecting that criminal activity was afoot and ruled that the evidence of the marijuana should have been suppressed.

In *State v. Dixon*, 218 S.W.3d 14 (Mo. App. 2007), the defendant's car broke down on the side of the highway. While the defendant waited on the side of the highway for assistance, a police officer stopped

[38] For more cases demonstrating Judge Breckenridge's judicial approach to criminal cases, see: Day v. State, 143 S.W.3d 690 (Mo. App. 2004); Gray v. State, 139 S.W.3d 617 (Mo. App. 2004); Patterson v. State, 110 S.W.3d 896 (Mo. App. 2003); Kuehne v. State, 107 S.W.3d 285 (Mo. App. 2003); Gennetten v. State, 96 S.W.3d 143 (Mo. App. 2003); State v. Griddine, 75 S.W.3d 741 (Mo. App. 2002); State v. Dixon, 70 S.W.3d 540 (Mo. App. 2002); Garner v. State, 62 S.W.3d 716 (Mo. App. 2001); State v. Simonton, 49 S.W.3d 766 (Mo. App. 2001); State v. Frost, 49 S.W.3d 212 (Mo. App. 2001).

and asked the defendant if he needed assistance. Defendant declined the officer's assistance. The police officer then asked the defendant if he could see his driver's license, asked him to stay in the car, and took the driver's license back to his vehicle to fill out reports and run a check for warrants.

A subsequent search yielded evidence of methamphetamine possession. At trial the defendant filed a motion to suppress this evidence and the trial court granted the motion on the basis that the evidence was fruit of the poisonous tree because the initial seizure of the defendant had been unreasonable. The State appealed, arguing that the defendant had not been seized because he was free to leave at any time during the encounter with the officer. Judge Breckenridge gave the trial court the requisite level of deference, so as to support the trial court's decision to suppress the evidence.

See also, *State v. Gabbert*, 213 S.W.3d 713 (Mo. App. 2007), wherein Judge Breckenridge affirmed the trial court's decision to grant a motion to suppress evidence of a weapon in a case where the defendant consented to the search that revealed the weapon in question. In contrast, in *State v. Renfrow*, 224 S.W.3d 27 (Mo. App. 2007), Judge Breckenridge applied the standard of review much more aggressively and overruled the defendant's conviction.

In *Renfrow*, a police officer observed the defendant's vehicle driving erratically and veering onto the shoulder of the road, back over the centerline and back across the road. The defendant was subsequently stopped, and, after a field sobriety test revealed that defendant's blood alcohol content was .134, he was arrested. The State charged him with driving while intoxicated and he was convicted. The defendant appealed and claimed that the trial court erred in overruling his motion to suppress evidence of his intoxication because the evidence was the product of an illegal stop. Specifically, he argued that the stop was unlawful because the stop was conducted by a police officer outside of his jurisdiction. Judge Breckenridge applied the standard of review in such a way that gave very little deference to the trial court and held that the evidence of Mr. Renfrow's intoxication was obtained through the exploitation of his unlawful seizure.

Judge Breckenridge's active approach to analyzing evidentiary questions has not been limited to the context of illegal searches and seizures. In the very recent and controversial case of *State v. Rios*, 2007 Mo. App. LEXIS 670 April 27, 2007, Judge Breckenridge relied on the hearsay rule to overturn the murder conviction of Steven Rios, a former Columbia police officer who had been convicted on charges of first-degree murder in the brutal death of Jesse Valencia. Many prosecutors and commentators have lamented the decision as having eliminated a long standing and nearly universally adopted exception to the hearsay rule.

In *Rios* the trial court applied the state of mind exception to admit Valencia's statement, made to a friend, that he would disclose the fact that he and Mr. Rios were having an extramarital affair if Mr. Rios did not fix his traffic ticket. Breckenridge reversed Rios's conviction on the basis that the hearsay statement was prejudicial and that the prejudice of admitting the statement outweighed its relevance.

The State argued that the statement was admissible because it showed state of mind. Specifically, it showed intent to perform a specific act in the future - an act that was relevant and that provided Mr. Rios with motive to kill Valencia. And, as the state argued, "The state of mind exception to the hearsay rule allows the admission of statements to show a future intent of the declarant to perform an act if the occurrence of that act is at issue."

Though she acknowledged the applicability of the state of mind exception and correctly stated that law, Judge Breckenridge applied the law to the facts in a subjective manner that would prevent the exception from applying in virtually every circumstance. Missouri law, like a significant majority of other states, requires the state of mind exception be limited to acts that are to be performed in the immediate future. Judge Breckenridge wrote extensively on the meaning of "immediate future" and concluded that

Valencia's disclosure of his relationship with Mr. Rios to interested parties was not going to be performed in the "immediate future."

Judge Breckenridge's analysis gives the term "immediate future" to these facts gives the term an especially rigid meaning that demonstrates her view of the hearsay rule and its exceptions. It seems to be confused with another well known hearsay exception, the "excited utterance." Likewise, the *Rios* case further demonstrates Judge Breckenridge's approach to standards of review on appeal. In that case the appellate court was reviewing the trial court for an "abuse of discretion." Judge Breckenridge gave very little deference to the trial judge, who, as the abuse of discretion standard understands, has far better access to evidence and to testimony than a judge reviewing the evidence on appeal.

Judge Holliger

Judge Holliger's record on criminal law issues, while not as liberal as Judge Breckenridge, clearly demonstrates a pattern of siding with defendants and ruling in ways that reflect a definite alignment with the current majority of the Supreme Court liberalizing Missouri's criminal laws.[39]

In *State v. Wood*, 128 S.W.3d 913 (Mo. App. 2004), law enforcement officers responded to a 911 call and found that Tina Wood and her six young children had been shot and that all but the two youngest children had been killed. The defendant-husband was arrested at the scene. Once in custody of the police the defendant was advised of his Miranda rights and asked to sign a statement acknowledging that he understood those rights. He then made a statement confessing to the murder of his wife and children.

Thereafter, the defendant filed a motion to suppress any evidence of that statement on the basis that it was involuntary. The defendant argued that it was involuntary because of his history of mental illness and because of the coercive conduct of the police in choosing to have the defendant interrogated by a police officer who was a good friend and minister of the defendant's.

The trial court suppressed the statement and the State filed an interlocutory appeal. On appeal the State argued that the trial court erred because the statement was made by the defendant of his own free will. In Missouri, "The test for voluntariness is whether, under the totality of the circumstances, the defendant was deprived of free choice to admit, to deny, or to refuse to answer and whether physical or psychological coercion was of such a degree that the defendant's will was overborne at the time he confessed."

Judge Holliger and his colleagues ruled that the trial court was correct in finding that the defendant's history of mental illness and the use of the defendant's friend as an interrogator rendered the confession involuntary. They affirmed the decision to suppress the confession.

In *State v. Trenter*, 85 S.W.3d 662 (Mo. App. 2002), the defendants were charged with possession of a controlled substance with intent to distribute after a search yielded evidence of marijuana, large amounts of cash, and weapons. The defendants brought motion to suppress evidence alleging that the affidavit supporting the search warrant leading to the search contained false information so that the probable cause for the search was invalid. The trial court agreed with the defendants and granted the motion. On appeal, the State argued that the standard of review of the trial court's probable cause determination should be the more searching de novo standard and that application of that standard would reveal probable cause, so

[39] For more cases demonstrating Judge Holliger's judicial approach to criminal cases, see: State v. McDonald, 170 S.W.3d 535 (Mo. App. 2005); State v. Creamer, 161 S.W.3d 420 (Mo. App. 2005); State v. Jackson, 155 S.W.3d 849 (Mo. App. 2005); Benedict v. State, 139 S.W.3d 264 (Mo. App. 2004); State v. Sanders, 126 S.W.3d 5 (Mo. App. 2003); State v. Rauch, 118 S.W.3d 263 (Mo. App. 2003); State v. Hendrix, 81 S.W.3d 79 (Mo. App. 2002); State v. Smith, 33 S.W.3d 648 (Mo. App. 2000); State v. Pennington, 24 S.W.3d 185 (Mo. App. 2000).

that granting the motion to suppress was reversible error. Judge Holliger disagreed, holding that the de novo standard applied in cases of warrantless searches, and applied the more lenient "clearly erroneous" standard because there had been a warrant in this case. The suppression of the evidence was affirmed.

In *State v. Roark*, 2007 WL 1673447 (Mo. App. 2007), a police officer received a call from dispatch that a potentially drunk driver was headed his direction. The officer received a vehicle description and license plate number and proceeded to follow the defendant once he saw his vehicle. The officer testified that he saw the defendant's passenger-side tires cross the fog line twice, onto the paved shoulder of the highway. The defendant eventually pulled off the highway and into the parking lot of a hotel, where he proceeded to enter and take a seat at the bar. The officer followed him and asked him to go outside, at which point the officer conducted a field sobriety test and arrested the defendant for driving while intoxicated. The defendant filed a motion to suppress evidence of the field sobriety test on the basis that the officer did not have probable cause or reasonable grounds to stop or initiate contact or to administer the field sobriety test. The trial court denied the motion and the defendant was convicted of driving while intoxicated.

On appeal, the state argued that review of the trial court should be for plain error, an extremely deferential standard, because the defendant had not objected to admission of the evidence during the actual trial and thus did not have anything to appeal. Judge Holliger dismissed the State's argument by concluding that the defendant had referred to his motion to suppress during the trial so that, even though he did not technically object to the introduction of the evidence, he intended to do exactly that by raising the suppression issue again at the actual trial.

After applying the more lenient "clearly erroneous" standard Judge Holliger concluded that the trial court had erred because the police officer's decision to ask the defendant to go outside with him at the bar was a stop for which he had no reasonable suspicion. Specifically, Judge Holliger concluded that the police officer's statements about the defendant's vehicle crossing the fog line twice were not enough to justify the subsequent stop and the field sobriety test that ensued.

In *State v. Hayes*, 51 S.W.3d 190 (Mo. App. 2001), police officers stopped the defendant while he was walking on the road, where sidewalks were available, because they thought he might be intoxicated. One of the officers informed the defendant that if he wanted a ride home then he would need to be sure the defendant did not have drugs or weapons on his person. When asked by one of the offices if he could search him for drugs and weapons the defendant responded, "Go ahead." The officer proceeded to pat down the defendant and, after feeling something in the left front pocket, pulled an empty wadded up cigarette packet from the pocket and laid it on the patrol car. The defendant grabbed the cigarette packet and, as the officer grabbed the defendant's arm, the defendant ran away from the officer. Once he had been restrained, the officer once again took the cigarette packet, opened it, and discovered cocaine. At trial the defendant was convicted of possession of a controlled substance.

On appeal, the defendant argued that his consent to the search conducted by the officer had been withdrawn before the officer discovered the cocaine so that the search violated his Fourth Amendment rights. Judge Holliger agreed, holding that the defendant's conduct during the search clearly indicated his intent to withdraw consent for a search. The state argued that even if he had withdrawn consent, reasonable suspicion existed to justify the search because the officer knew that empty cigarette packets are frequently used to transport narcotics, and the defendant's flight from the officer indicated a consciousness of guilt. Judge Holliger disagreed and held that the officer's reasons were insufficient, that the search violated the defendant's constitutional rights, and that the trial court's judgment was clearly erroneous.

Judge Baker

Judge Baker's record on criminal law issues is mixed, but shows a tendency to side with the liberalization of Missouri criminal law.

In *McClendon v. State*, S.W.3d, WL 218777 (Mo. App. 2007) the state offered a plea bargain to the defendant, a repeat offender, offering a seven year sentence. The defendant refused, believing the offer to be inadequate, as he had an incorrect impression of the possible maximum sentence for his crime. Judge Baker, writing for the majority, held that the defendant's counsel's failure to inform him of the correct maximum sentence prejudiced the defendant and remanded the case.

In *State v. Scott*, 200 S.W.3d 41 (Mo. App. 2006) the defendant was pulled over for driving with a burned-out taillight. The officers then discovered that the defendant was driving on a suspended license and was currently out on probation for drug offenses. Upon searching the defendant and his vehicle, officers discovered crack cocaine. The defendant later attempted to seize and destroy the evidence. The defendant, after being convicted by a jury of tampering with evidence, challenged the admission of the drugs seized from his car on Fourth Amendment grounds. While a narrow court majority upheld the defendant's conviction, Judge Baker joined in the dissent, arguing that because the evidence was improperly seized, the defendant had grounds for a new trial.

In *Matthews v. State*, 2005 WL 464954 (Mo. App. 2005) the defendant was convicted of delivery of a controlled substance in a school zone. He subsequently filed for post-conviction relief, arguing, inter alia, that his attorney was ineffective for not objecting to a change of venue to another county and that his counsel was ineffective for failing to play a surveillance tape of the defendant's drug transactions. Judge Baker concurred with the majority opinion, reversing in part the decision of the circuit court, finding that the defendant was in fact entitled to a hearing on his claim regarding the surveillance tapes. The reversal was based on the reasoning that the defendant's counsel's "[t]rial strategy must be reasonable," and that "the record [did] not conclusively show counsel's decision not to play the surveillance tape recordings [were] reasonable trial strategy."[40] On appeal, the Supreme Court reversed the Court of Appeals and affirmed the ruling of the Circuit Court, finding that "[t]here is a strong presumption that the trial counsel's strategy was reasonable," pointing to the fact that the defendant and his counsel had "discuss[ed] the matter at great length" before trial.[41]

In *State v. Clark*, WL 3286017 (Mo. App. 2005), the defendant was convicted of three felonies. During the penalty phase of his trial, the State decided to introduce to the court four prior acquittals for murder, one of which regarded a police officer. While the defendant had been acquitted of these crimes, the State was able to show that his gun was used not only in the crime they were currently prosecuting, but also in the four other murders the defendant had been acquitted of. The majority, with Judge Baker concurring, reasoned that acquittals were not proof of innocence, but rather just that the State had failed to prove an essential element of its case. The court relied on the reasoning of the United States Supreme Court in *United States v. Watts*, 519 U.S. 148 (1997). In *Watts*, the Court found that an acquittal in a criminal case does not preclude the Government from re-litigating an issue when it is presented in a subsequent action governed by a lesser standard of proof. *Watts* also held that a jury's verdict of acquittal does not prevent a sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence. *Clark* was appealed and reviewed by the Supreme Court and was affirmed.

[40] Matthews v. State, 175 S.W.3d 110 (Mo. banc 2005).
[41] *Id.* at 115.

Workers' Compensation

Missouri's workers' compensation law has been one of the most controversial areas of state law since 1993 when the Missouri legislature amended the state's law and provided courts with a great deal of latitude in determining whether to award benefits for injuries bearing some relationship to work. Critics, particularly employers and those shouldering the cost of the increasing number and size of awards, began asking for relief from what was perceived as an excessively liberal standard for awarding benefits.

In 2005, Governor Blunt signed legislation that significantly altered the legal landscape for workers' compensation claims by, among other things, imposing a much stricter definition of compensable injuries.[42] Before the new law went into effect, work had only to be a "substantial" factor in the cause of injury, a standard that was not difficult to reach and that, according to critics of the law, gave plaintiff-friendly judges the tools to impose exorbitant and unnecessary costs on Missouri's employers. Under the new law, however, an injured worker must demonstrate that work was the "prevailing" factor or primary cause of an injury.

Because of the controversy in this area of law, the legal community and political leaders have placed a great deal of emphasis on a potential judge's treatment of workers' compensation claims. The Supreme Court's recent decision in *Schoemehl v. Treasurer of State*, 217 S.W.3d 900, (Mo. banc 2007), is illustrative of the different approach to workers' compensation law taken by the new majority in comparison to the judges of the Ashcroft Court. As one would expect, it had always been the law in Missouri that a disability ceased at the death of the disabled individual. In *Schoemehl*, however, Judge Teitelman, writing for the majority, held that the widow of a deceased beneficiary was entitled to benefits as a dependant of the deceased even though the statute only allowed benefits "during the continuance of [the] disability." The effect of this ruling is to increase workers compensation taxes on Missouri businesses.

Without question, the upcoming appointment to the Supreme Court will have serious implications in this vital area of the law.

Judge Breckenridge

Judge Breckenridge's record suggests that she would interpret Missouri's workers' compensation law fairly strictly and join the more conservative members of the court in cases involving workers' compensation claims.[43]

The following two cases are particularly helpful to understanding her approach in workers' compensation claims. In *Jenkins v. Manpower on Site at Proctor and Gamble*, 106 S.W.3d 620 (Mo. App. 2003) and again in *Nicholson v. Transamerica Occidental Life Ins. Co.*, 144 S.W.3d 302 (Mo. App. 2004), Judge Breckenridge dismissed the appeals of plaintiffs who had been denied benefits by the Labor and Industrial Relations Commission.

What is particularly notable about these two cases, and her approach to this area of the law in general, is that she strictly applies Supreme Court Rule 84 - setting forth the technical requirements for briefs - to dispose of the cases. A reasonable observer could thus conclude that Judge Breckenridge's appointment to the Supreme Court would bring renewed emphasis on strict application of technical rules even in cases where plaintiffs are disallowed benefits under the workers' compensation law.

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[42] *See* Chapter 287 of the Revised Statutes of Missouri.

[43] For more cases demonstrating Judge Breckenridge's judicial approach to workers' compensation cases, see: Augur v. Norfolk Southern Ry. Co., 154 S.W.3d 510 (Mo. App. 2005); Dolgencorp, Inc. v. Zatorski, 134 S.W.3d 813 (Mo. App. 2004); Dixon v. Division of Employment Sec. 106 S.W.3d 536 (Mo. App. 2003); Meek v. Pizza Inn, 903 S.W.2d 541 (Mo. App. 1995).

Judge Holliger

Judge Holliger's judicial record suggests a claimant-friendly attitude in workers' compensation cases, one that would resemble the judicial standard in effect prior to the 2005 legislation restricting claims.[44]

In *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602 (Mo. App. 2005), the plaintiff was severely injured in a car accident while driving home from a work-sponsored golf tournament. The plaintiff filed a claim for workers' compensation benefits and the Labor and Industrial Relations Commission entered the award in favor of the plaintiff. Hartford Insurance Company appealed the award on the basis that the plaintiff was driving home just as he would have driven home from work on any other day and was therefore not arising "out of or in the course of" his employment. A majority of the Court of Appeals, including Judge Holliger, affirmed the Commission's decision, holding that "Such a journey home is considered to be in the course and scope of employment of an employee whose work entails travel away from the employer's premises."

Judge Smart vigorously dissented from the majority opinion, arguing that "The broad application of words and phrases can go no broader than the boundaries of the plain and ordinary meaning of the terms in question." To explain how the majority had done just that, Judge Smart stated that "the claimant's injuries bore a circumstantial or positional relationship to his employment. The claimant, a few minutes before the accident, had been engaged in work for his employer; and, were it not for his work, he presumably would have been somewhere else at the time of the accident. Because of the positional relationship of the injury to his employment, and because of natural sympathy as to his injuries, there is a huge temptation to construe the Workers' Compensation Act in such a way as to award compensation for these injuries. What is troubling, however, is the question of whether, as a matter of statutory interpretation, we can reasonably rule that this injury arose 'in the course of' his employment, within the meaning of [the workers' compensation law]."

In *Byous v. Missouri Local Government Employees Retirement System Bd. of Trustees*, 157 S.W.3d 740 (Mo. App. 2005), a firefighter became permanently and totally incapacitated from his job after he had a heart attack and was diagnosed with coronary artery disease. He sought work-related disability benefits through the Missouri Local Government Employees Retirement System (LAGERS). Under applicable law, it was presumed that the injury was work related, "unless the contrary be shown by competent evidence." The LAGERS Board of Trustees (Board) found that this presumption was rebutted by competent evidence that his heart disease was caused by risk factors and not by his work. Based on this finding he was denied disability benefits. The Board's decision was affirmed by the trial court.

On appeal to the Western District Court of Appeals, Judge Holliger and a majority of the court cited the law of several other states to impose a very high burden on defendants attempting to show that injuries are not work related. The majority held that to overcome the presumption that the disability was work related, the defendant must show that work did not cause the disease and that a non-work-related cause must have caused the disease, not merely be one of several factors, and it must not itself have been caused by work. The majority then held that the defendant in this case had not met that standard and that the denial of benefits should be reversed.

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[44] For more cases demonstrating Judge Holliger's judicial approach to workers' compensation cases, see: Cox v. Collins, 184 S.W.3d 590 (Mo. App. 2006); Higgins v. The Quaker Oats Co., 183 S.W.3d 264 (Mo. App. 2005); Vulgamott v. Perry, 154 S.W.3d 382 (Mo. App. 2004); Kent v. Goodyear Tire and Rubber Co., 147 S.W.3d 865 (Mo. App. 2004); Carnal v. Pride Cleaners, 138 S.W.3d 155 (Mo. App. 2004); Thatcher v. Trans World Airlines, 69 S.W.3d 533 (Mo. App. 2002); Shurvington v. Cavender Drywall, 36 S.W.3d 432 (Mo. App. 2001); Quik 'N Tasty Foods, Inc. v. Division of Employment Security, 17 S.W.3d 620 (Mo. App. 2000).

The dissenting judges took the majority to task for giving the statutory line-of-duty presumption a "strained interpretation." Because heart diseases are multifactorial diseases, the dissenters argued, it was unreasonable and statutorily unnecessary for the majority to read the statutory presumption as requiring that LAGERS prove the specific cause of the coronary artery disease. According to the dissent, "it is enough to defeat a claim if a physician acquainted with the pertinent risk factors as to a particular claimant's disease can provide, with reasonable medical certainty, an articulable and reasonable basis (which the physicians in this case did not do) to conclude that the risk factors were not incurred or aggravated by duty. That is, it is enough to defeat the claim if the testimony is believed by the LAGERS Board of Trustees-even if the physician cannot state with particularity any specific non-work cause of the risk factors."

Judge Baker

Like Judge Holliger, Judge Baker's record also suggests a claimant-friendly attitude in workers' compensation cases. Unlike Judge Holliger, however, Judge Baker's record in workers' compensation cases must be gleaned from a much smaller record of cases as she has authored very few opinions.

In *Townser v. First Data Corp*., 215 S.W.3d 237 (Mo. App. 2007), Judge Baker, writing for the court majority, reversed a lower court ruling finding that claimant's claim for disability compensation for carpal tunnel syndrome was without merit. First Data Corporation had conducted an ergonomic study of their business revealing that their customer service representatives' maximum keystroke exposure was 56% below the "suggested rate," and that the repetitions performed by the tested individuals would not place them at risk for carpel tunnel syndrome.[45] Judge Baker held that the claimant only needed to show a probability that the occupational disease was caused by conditions in the work place, that her employment need not be the sole cause of the disease, so long as it was a substantial contributing factor to the injury, and that a single medical opinion would support a finding of compensability even where the causes of the injury were inconclusive.[46]

In *Knisley v. Charleswood Corp*., 211 S.W.3d 629 (Mo. App. 2007), the defendant appealed from the final award of the Labor and Industrial Relations Commission. The Commission awarded her compensation from her employer but denied her compensation from the Second Injury Fund (SIF). The Commission's conclusion was that the defendant did not establish that she had pre-existing disabilities significant enough to combine with her back injury to be awarded relief from the SIF. The defendant had previously suffered with breast cancer some years earlier.

In her concurrence with the majority, Judge Baker reversed the Commission's decision as it regarded the SIF, and held that the defendant only needed to establish that she had pre-existing permanent partial disabilities that, when combined with her back injury, rendered her disabled. Furthermore, the court held that the defendant had no burden to assign percentages to each of her pre-existing disabilities to show how they combined with her work related injury to substantiate disability.

Torts, Personal Injury and Employer Liability

Since 2002, when Carnahan-Holden appointees took over the majority of the Supreme Court from the Ashcroft appointees, the court has been increasingly disposed to liberalizing traditional tort law. Specifically, the Carnahan-Holden court has diverged from its Ashcroft predecessors in the expansion of

[45] *Townser*, at 240.
[46] *Id*. at 242.

the "duty of care" that business owners owe to patrons and to third parties.[47] It is more likely than not that all three nominees would continue the current Court's trend[48] of expanding liability.[49]

Judge Breckenridge

Though she does not have an extensive record in this area of the law, as compared to her record in criminal law, the opinions Judge Breckenridge has authored in the personal injury and employer liability context illustrate that she tends to favor plaintiffs.

In *Buchheit, Inc. v. Missouri Com'n on Human Rights*, 215 S.W.3d 268 (Mo. App. 2007), the plaintiff brought a claim of discrimination after her employer dismissed her for allegedly spending too much time on the telephone during work hours and for several incidents of misconduct related to "horsing around." The plaintiff argued that these reasons for her dismissal were pretext and that she was treated disparately than similarly situated male employees. Under applicable law, a plaintiff may show pretext by showing that the complainant was treated less favorably than similarly situated employees outside of her protected group. Specifically, the individuals used for comparison must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.

In this case Judge Breckenridge ruled in favor of plaintiff, despite the fact that the person with whom it was alleged she was "similarly situated" did not commit the same offense, did not share the same position of employment, and performed different actions. Specifically, the plaintiff in this case lifted her shirt and exposed her breast in a publicly accessible area and engaged in excessive use of the telephone during work hours. Neither type of conduct was exhibited by the "similarly situated" male employee. Instead of applying the "similarly situated" standard strictly, Judge Breckenridge reached her conclusion by arguing that because plaintiff and the male employee were involved in the same series of events – male employee was supervisor of plaintiff – then the standard for pretext had been met.

In *Briggs v. Kansas City Southern Ry. Co.*, a railroad employee brought sued his employer for damages after he fell over a buried tie plate and was injured. A jury awarded the plaintiff $150,000, and that award was subsequently reduced by $40,000 by the trial court. On appeal, Judge Breckenridge held that the $40,000 reduction was not justified because "evidence of pain and suffering and future medical expenses supports the jury's verdict." She reversed the trial court's ruling on that issue and ordered the juries previous award reinstated.

Judge Holliger

In 1990, well before he was appointed to serve on the Court of Appeals, Judge Holliger appeared on behalf of the Missouri Association of Trial Attorneys ("MATA", the association of plaintiffs personal injury attorneys) in the case *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595 (Mo. banc 1990). Because of his close association with MATA, one would expect Judge Holliger to adopt a plaintiff-friendly position in most cases involving claims for damages for personal injury. Of course, not all personal injury cases are unfounded and indeed are just and good causes of action. For example, in *Asaro*, the plaintiff alleged that health care providers negligently treated her son and that she suffered emotional distress as the result of that malpractice to her son. A majority of the Supreme Court held that

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[47] See L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co., L.P**.** 75 S.W.3d 247 (Mo. 2002) (finding that business owed duty of care against the criminal activity of third parties because danger was "foreseeable") (Limbaugh, J., and Benton, J., dissenting).

[48] *See also* McBryde v. Ritenour School District, 207 S. W. 3d 162 (Mo. App. 2006)

[49] *See* In State ex rel. Doe Run Resources Corp. v. Neill, 128 S.W.3d 502 (Mo. banc 2004); *and Judicial Selection Consequences*, supra note 6.

a plaintiff with a close family relationship may recover for emotional distress resulting solely from observing injury to a family member caused by a defendant's negligence.

Judge Holliger's record as a judge reveals that his preference for siding with plaintiffs n tort actions and would continue to expand the notions of causation increasing individual, insurance and corporate liability.

In *Richardson v. QuikTrip Corp*., 81 S.W.3d 54 (Mo. App. 2002), plaintiff was raped in the bathroom of a QuickTrip convenience store. Plaintiff sued QuickTrip alleging the store was negligent for failing to warn of the danger and for negligently disabling the door lock. QuickTrip filed a motion for summary judgment on the basis that store owners have no duty to protect patrons from the violent crimes of third parties. On appeal, Judge Holliger and a majority of the Court of Appeals held that the totality of the circumstances in this case placed the store under a duty to protect the plaintiff from the rape. Specifically, the majority pointed to the fact that the store was a 24-hour convenience store, that the store had been robbed in the past, and that a rape had occurred at a truck stop near the store. Though no rape had occurred in the restroom of the store as it did in this case, the majority held that it was foreseeable that such an event could occur and thus it was negligent of QuickTrip to fail in protecting the plaintiff from the third party's violent crime.

In *Weaver v. African Methodist Episcopal Church, Inc*., 54 S.W.3d 575 (Mo. App. 2001) the plaintiff filed a three-count petition against the defendant alleging that he had sexually harassed her and coerced her to have sexual relations in exchange for his sponsorship and support of her ordination as a minister.

The trial court entered judgment in favor of the plaintiff and awarded her four million dollars in punitive damages. On appeal, the defendant argued, among other things, that the damages award was grossly excessive in that the ratio of punitive damages to actual damages was than 66:1. Judge Holliger and the Court of Appeals stated that "The degree of reprehensibility of the defendant's conduct is considered the 'the most important indicum' of the reasonableness of a punitive damages award" and sided with the plaintiff in rejecting the defendant's claim of excessive damages.

Judge Baker

In *Brady v. Curators of University of Missouri*, 213 S.W.3d 101 (Mo. App. 2006), a baseball coach who was reduced to a part-time coaching position at UMSL brought an action against the university, the athletic director, and vice chancellor for administrative affairs, alleging age discrimination and retaliation in employment. In Judge Baker's majority opinion, the court held that, inter alia, in addition to a punitive damage award of $750,000 against UMSL, that an award of $200,000 against the vice chancellor for administrative affairs and $100,000 against the athletic director were justified under the MHRA, finding that the vice chancellor and the athletic director, as supervisors of the baseball coach, were also the baseball coach's "employers," in addition to UMSL. Such liberalization strays significantly from the traditional understanding of both Missouri law as well as that of the federal courts.[50]

Traditionally, Missouri courts have applied Title VII case law when evaluating discrimination suits brought under the MHRA.[51] In this vein, employees of an institution—including its supervisors and managers—were not held as "employers" under the MHRA, and thus could not be subject to individual

[50] *See* Birkbeck v. Marvel Lighting Co., 30 F.3d 507, 510-11 (4th Cir.1994), *cert. denied,* 513 U.S. 1058, 115 S.Ct. 666, 130 L.Ed.2d 600 (1994); Lankford v. City of Hobart, 27 F.3d 477, 480 (10th Cir.1994); 513 U.S. 1015, 115 S.Ct. 574 (1994); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir.1993), *cert. denied,* 510 U.S. 1109, 114 S.Ct. 1049, 127 L.Ed.2d 372 (1994).

[51] *Brady*, at 113.

liability.[52] Judge Baker, writing that the Court "[d]oes not blindly follow the predictions of the federal courts", ruled that in fact the MHRA's definition of "employer" does and should allow individuals to also be regarded as "employers", in turn creating potential liability for individuals and expanding the avenues plaintiffs can pursue when filing discrimination claims.[53] Such a ruling is consistent with the views of a majority of the justices on the current Supreme Court who have recently been expanding individual liability for institutional employees.[54]

Another area in which the Carnahan-Holden court has diverged from its Ashcroft predecessors is in the expansion of the "duty of care" that business owners owe to patrons and to third parties.[55] It is fair to reason that Judge Baker would continue the current Court's expansion of tort liability. [56]

In *Cooper v. Capital Investment, LLC*. 204 S.W.3d 331 (Mo. App. 2006), the plaintiff was walking on the sidewalk in front of the defendant's property when he slipped and fell on ice that partially covered the sidewalk. The plaintiff subsequently filed his petition against Capital Investment. The trial judge granted summary judgment in favor of the defendant on the grounds that plaintiff had not presented any evidence indicating the ice on which Cooper slipped and fell had anything to do with the defendant. Furthermore, certified data indicated that at the time of the fall, the weather was cloudy, overcast and icy. Traditionally, land owners have had no duty to remove ice or snow from outside areas or from an abutting sidewalk if they are the result of the general weather conditions.[57] Judge Baker reversed and remanded the ruling of the trial court, finding that genuine issues of material fact existed as to whether Capital Investment, through either affirmative action or negligence, created the hazard on the sidewalk on which plaintiff had fallen.[58]

Next Steps: Governor's Options, Court Challenges and Changes to the Plan.

Governor's Options

Unless a nominee withdraws from consideration, in which case the Commission would have failed to submit three persons for consideration, a legal challenge under the Sunshine Law or a legal challenge on Equal Protection grounds, Governor Matt Blunt has until late September to make a choice for the Supreme Court. Instead of making a choice, the Governor could refuse to appoint any of the candidates and leave the Commission in the position of having to choose one of the three nominees. Since the nominee would have to face a retention election during the same time as the 2008 elections, including the Governor and Attorney General race, that nominee would face scrutiny like no other judge in Missouri's history. That judge would also be handicapped in that, under Missouri's Constitution, a judge appointed according to the Missouri Plan may not participate in elections.

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[52] *See* Smith v. St. Bernards Regional Medical Center, 19 F.3d 1254, 1255 (8th Cir.1994) (finding that individuals cannot be held liable in their individual capacities under Title VII when individuals might be considered agents of their employer); *see supra* note 1.
[53] *Brady*, at 112-113 (quoting Hill v. Ford Motor Co**.** 324 F.Supp.2d 1028 (E.D.Mo.,2004)).
[54] *See* In State ex rel. Doe Run Resources Corp. v. Neill, 128 S.W.3d 502 (Mo. banc 2004); *and Judicial Selection Consequences*, supra note 6.
[55] *See* Ward Parkway Shopping Center Co., L.P., 75 S.W.3d 247 (finding that business owed duty of care against the criminal activity of third parties because danger was 'foreseeable') (Limbaugh, J., and Benton, J., dissenting).
[56] *See also* McBryde, 207 S. W. 3d 162.
[57] *See* Stein v. Mansion House Ctr., 647 S.W.2d 918, 919 (Mo. App. 1983).
[58] *Cooper*, at 331.

Court Challenges

Two principle challenges to the Missouri Plan and its execution are being vetted. The first is on Equal Protection grounds of the Fourteenth Amendment. In summary, there are two challenges. First, by permitting only those people who hold a license to practice law in Missouri and who pay Bar Association dues to hold the office of Appellate Judicial Commissioner seemingly violates the prohibitions related to the obligation to hold real property in order to stand for election.[59] Second, in permitting only Missouri Bar attorneys to vote is an impermissible qualification on voting rights and given the geographical split of the commissions not in any reference to population is a seeming violation of the "one person, one vote" Constitutional protections.[60] By holding an election for a public office on the Commission, by limiting that vote to lawyers and the public office to lawyers, the voting rights of all Missourians may be violated.

The second challenge is to the secret meetings of the Commission under Missouri's Sunshine Law. Under the Sunshine Law, in Section 610.021, R.S.Mo., there are "limited, narrowly defined exceptions" to the otherwise "wide-scale opening of public governmental activities" which is to be "construed liberally" to "promote this open public policy."[61] Quite simply, a democracy should be open to the press and public. Commissioners are nothing more than stewards of the public trust. Their expenses are paid by Missouri tax payers. There decisions will have a significant impact on the public and the taxpayer. Citizens should have a right to understand the Commission's hearings and views.

The Missouri Supreme Court has relied on the Sunshine Law's provision that eliminates compliance "where otherwise provided by law" by creating a Supreme Court "Rule" under the Constitutions enabling provision to create rules of "administration." But, as the preceding section of the Missouri Constitution points out, the Constitution made a distinction between "Supreme Court rule" and "law."[62]

Undeterred by the provisions of the Sunshine Law, the Supreme Court has passed a court rule that requires each Commissioner to swear an oath of secrecy about the Commission's proceedings and deliberations. Missouri Supreme Court Rule 10.05(b):

> All elective and appointive members of any commission shall, before entering upon their duties, take an oath . . . that they will not disclose or reveal any fact or information obtained by them or any of the proceedings of the commission having to do with any matter brought before the commission. Such oath of office shall be administered by the Chairman of the Commission to each member before that member can carry out his duties under the provisions of these rules.

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[59] *See* Quinn v. Milsap, 491 U.S. 95 (1989) ("As this Court in *Turner* explained, the Equal Protection Clause protects the 'right to be considered for public service without the burden of invidiously discriminatory disqualifications.' 396 U.S., at 362. Membership on the board of freeholders is a form of public service, even if the board only recommends a proposal to the electorate and does not enact laws directly. Thus, the Equal Protection Clause protects appellants' right to be considered for appointment to the board without the burden of 'invidiously discriminatory disqualifications [of owning real property].")

[60] *See* Hadley v. Junior College District, 397 U.S. 50 (1970) ("We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials . . . . once a State has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.") *Id.* at 59. *But see* African-American Voting Rights Legal Defense Fund, Inc., v. State of Missouri, 994 F.Supp. 1105 (E.D.Mo. 1997), *affirmed without published opinion* 133 F.3d 921 (8th Cir.1998).

[61] Smith v. Sheriff, 982 S.W.2d 775, at 778 (Mo. App. 1998).

[62] *Compare* MO. CONST. art [24d] and [25].

Moreover, in comparing the federal law equivalent in the Freedom of Information Act ("FOIA") where nearly all application materials and all hearing are subject to FOIA, it is difficult to see how swearing to secrecy because of a rule of the Supreme Court can supersede the Sunshine Law and its public policy in favor of open and public meetings of government.

Legislative Options

As already discussed, the Appellate Judicial Commission conducted its interview and selection process in absolute secrecy. Further, when questioned about the decision to ignore Missouri's Sunshine Law, the Commission responded by claiming that a Supreme Court Rule trumped the Sunshine Law, despite the fact that the Sunshine Law applies with great specificity to all government activity in the state. Specifically, the secrecy was defended by reference to Supreme Court Rule 10.05. That rule establishes that the commission's meetings and all discussions will be subject to secrecy after each Commissioner takes a mandatory oath of confidentiality.

The legislature is not without recourse to respond to this aggressive encroachment on the intent to submit all of government to the same open records paradigm. Article V, section 5, of the Missouri Constitution states that:

> The Supreme Court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. *Any rule may be annulled or amended in whole or in part by a law limited to the purpose*.

As the Constitution itself makes clear, if the legislature wishes to amend or even annul a Supreme Court Rule it can do so through legislation that is specifically limited to that purpose. Accordingly, it is entirely within the authority of the General Assembly to address Supreme Court Rule 10.05 by passing legislation to require the judicial selection process be open to the public.

Proposed Changes to the Missouri Court Plan.

The competing interests in any judicial appointment method are the opposing forces of independence and accountability. In an elective democracy, the goal is to have a judiciary independent enough to enforce the constitutional rights of the minority from an overreaching majority. But a fair judiciary also assumes an accountability aspect such that unelected judges do not become a super legislature imposing their policy decisions upon a citizenry who can vote out those with whom the majority disagree.

The common defect in the Missouri Plan is that the Commission is, in every practical sense, unaccountable to Missourians. In a strange, strikingly elitist proposition, three members are elected. But Missourians may only participate in that election if they hold a license to practice law in Missouri and pay annual dues to the Missouri Bar. The reform measures proposed in the Missouri legislature during 2007 and expected to be filed in 2008, all attempt to restore a level of public accountability through the peoples elected representatives and additionally place an emphasis on open public hearings. Importantly, the then sitting governor (whether Republican, Democrat or other) will make the nomination. That governor will have to stand up to the electorate and declare for his or her nominee.

While the Missouri Bar sent and procured a number of prominent members of the Bar to the hearings, the common theme was that the Bar was opposed to all reforms. As described below, the Accountable

Commission Plan merely removed the control of voting on three members of the Commission from those with a Missouri Bar license to the peoples elected representatives. Given the opposition to this minor adjustment and the vehement opposition to a federal model as in HJR 31 described below, the Bar Association's objections appear to be motivated by self interest rather than in creating good government.

HJR 33: The Accountable Commission Plan

With barely a month to go in the 2007 legislative session where the Governorship, Senate and House are all controlled by Republicans, House Joint Resolution 33 was submitted by a leading Republican and Co-Sponsored by four other Republicans, including Speaker of the House Rod Jetton.

The Accountable Commission Plan is a slight modification of the Missouri Plan and would maintain the seven member commissions currently in use. The only difference is (1) that the Chief Justice position and the three members of the Missouri Bar currently elected only by Missouri lawyers would be appointed by the President of the Senate and Speaker of the House (two each); and, (2) that the Governor submits to the Commission for approval rather than the Commission submitting to the governor. The concept is simple: make the elected representatives of the people accountable for the court appointees. The concept is one borrowed from corporate law joint ventures where typically the positions of CEO, CFO and COO would take two parties to hire and when linked with HJR 34 below, all to fire.

To be specific, under Accountable Commission Plan, the Governor would still appoint three members to the commission and, by consequence, the Governor will be held accountable by the voters for the Commission appointments. The legislative appointments would likewise relieve any Equal Protection arguments and the seeming conflict of interest in the Chief Judge sitting on the panel appointing judges to his or her own court. Under the Accountable Commission Plan, the four members would still be members of the Missouri Bar, but would be appointed by and held accountable to the General Assembly. The majority would be held accountable by the voters for the actions of their appointees. Importantly, the Senate and the House appointees will still be members of the Bar and the expertise preserved, but will also be from amongst the House and Senate members, i.e., lawyer-legislators. The goal is to restore a level of accountability, even if only arm's length.

The Bar Association still remains very much part of the process under this plan. Not only would all commissioners be members of the Bar, but also the Bar Association would be given the opportunity to issue an opinion on the suitability of that nominee to serve on the courts.

Additionally, the Governor would have an important check on the legislature, by being able to nominate the candidate. Addressing the Sunshine Law issues, hearings on a candidate would be public such that the legislature will have a check on the Governor. Ultimately, the people have a check on the legislature and the Governor. This system seems far closer to the ideals of a democracy than having four unelected and unaccountable members of the Missouri Bar controlling the process for appointment of judges.

So too, Missouri voters agree. In a February poll, when Missouri voters were explained how the process for appointment of judges worked, two out of every three stated that the system should be changed.[63]

HJR 31: A Federal Model for Appointment

The Federal model of appointing judges with the Executive nominating and the upper house approving has stood the long test of time. The Founders agreed that this method was best in preserving the checks and balances within government. In the late 1700s celestial models demonstrating the pull and push of gravity were dinner discussion topics for the Renaissance Founders. The system of checks and balances had a celestial underpinning: each of the three branches of government should have an overlapping pull

[63] *See* http://www.fed-soc.org/doclib/20070324_missouripoll.pdf

and push on the other branches such that they all stay in celestial harmony. The appointment process is one of the most significant checks the executive and legislative branch have on the judicial branch.

A clear and concise statement of the importance of the Federal nomination plan was explained in the American Bar Association 2001 Legislative and Governmental Priorities, Task Force on an Independent Judiciary:

> "The nomination and confirmation process is the **one point** at which the political branches may exercise a check on the composition and quality of the federal bench. To these ends, **it is appropriate and desirable** for members of the Senate and the President to explore the qualifications, character and judicial philosophy of would-be judges." [64] (emphasis added)

Under the current Missouri Plan, there is no legislative check. To emphasize, there is not one point at all in the judicial appointment process where the legislature has any influence whatsoever on the judicial selection process. Couple this with the *de facto* life tenure nature of the Missouri Plan, and the "one point" to exercise a check on the judiciary, is lost.

In March 2007, House Joint Resolution 31 was introduced by a respected Republican representative. While only six weeks remained in the legislative session, the resolution made it through two committee hearings and was scheduled for a floor debate and vote the last two weeks of the legislative session. The floor debate and vote did not happen and it is expected that HJR 31 will be pre-filed for debate at the beginning of the session.

HJR 31 follows the federal model with the governor nominating a judge for a vacancy and a majority in the Senate voting for confirmation following hearings by a Committee of the Senate. The role of the Missouri Bar would be very important by permitting the Missouri Bar to provide an opinion on the qualification of a particular judge to serve.

Two important changes to the federal model were created to amend what most people find as defects in the federal system. First, in order to alleviate the long delays experienced in some federal appointments, the nominee would receive a mandatory up or down confirmation vote within ninety days of being nominated by the Governor. Second, the nominee would be permitted to call witnesses under oath and be able to call witnesses under oath who have offered testimony against him or her. It has also been suggested by a former U.S. Senator who served on the Judiciary Committee that the nominee should be entitled to have counsel of his or her choosing to defend and to question on the nominees behalf. During the debates, there was much discussion over the provision whereby the retention election would be transferred to the legislature and removed from the ballot. This feature is not an essential element of HJR 31.

HJR 34: Effective Retention and Removal

Since before World War II not a single Supreme Court or Court of Appeals judge has lost a retention election. Last November, a judge with a 30% rating, the lowest ever rating of any judge in the entire near 70 year history of Missouri's retention elections, was retained by a voter percentage within just a few points of those rated the highest in the State.[65] The current retention plan seems to be broken despite the last decade of work by the Missouri Bar and Missouri courts to "educate" voters on the process. As observed in one empirical study of retention elections in ten states, "formal judicial performance evaluations are unlikely on their own to lead voters to differentiate greatly among judges in retention

[64] American Bar Association, *An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence*.
[65] *Voters Guide*, ST. LOUIS POST DISPATCH, page 16, November 3, 2006.

elections . . . . A small retention margin is more associated with the presence of an organized opposition campaign . . . ."[66]

The amendment proposed by HJR 34 would delegate to the People's elected representatives the responsibility of determining whether a judge should be retained or removed. Importantly, it removes the first year retention vote and the twelve-year retention vote in favor of a vote once every decade for all judges. At the decade review, a judge will be retained in office by obtaining a simple majority of the General Assembly. The General Assembly will be assisted in its voting by recommendations of the judiciary committees of the House and Senate which, in turn, will be assisted by obtaining recommendations from the Missouri Bar Association. The goal will be to have better and further examination into the qualifications and performance of judges who sit on the bench.

A second feature of HJR 34 is an emergency measure whereby any judge could be removed at any time by the recommendation of the Governor and approval by two-thirds of the House and Senate. With high thresholds spread-out over three bodies, this hurdle is sufficiently high so as to deter pure political motivations while also serving as an effective tool for removing judges who are a real danger to the rule of law.

Conclusion.

In the Summer of 2007 the Appellate Judicial Commission failed to execute on the assumptions underlying the Missouri's Nonpartisan Court Plan or Merit Selection Plan. Whether the failure is chronic in a long trend of partisan manipulation of the defects of the Missouri Plan, or whether the failure was acute to this particular panel at this time is less important than the reaction of Missourians. In the near future, Missouri voters will weigh-in and decide whether to retain a judge opposed by the Governor and/or to amend the plan for appointing judges.

Judges Baker, Breckenridge and Hollinger have devoted a substantial part of their lives to public service and should be commended and admired for that public service. But the process by which they were nominated to serve as Missouri's next Supreme Court judge is undermined by secrecy, suspicion and allegations of a Commission having manipulated the system. Failure to secure the Governor's appointment should not be too disappointing for Judges Baker and Holliger, as the two are Democrats vying for appointment by a Republican governor. No governor has appointed someone from the opposite party in decades. The loser could be Judge Breckenridge. Had the Commission performed its duties properly, she may have been nominated with two other Republican candidates consistent with the process afforded the twelve years of Democrat governors. Instead, if she is confirmed, she will take her post on the Supreme Court under a cloud of doubt. In conclusion, for the aspiring Supreme Court judge who faces either a battering retention election or appointment under a cloud of doubt, having reached a professional high mark at the highest court of the state, he or she may well recognize Wordsworth's lamenting:

Whither is fled the visionary gleam?
Where is it now, the glory and the dream?

[66] Susan M. Olson, *Voter Mobilization in Judicial Retention Elections: Performance Evaluations and Organized Opposition*, 22 JUST. SYS. J. 263, 277-278 (2001).

APPENDIX 1.

DIRECT PUBLIC INPUT INTO STATE JUDICIAL SELECTION SYSTEMS

Highest Degree of Public Input							
ELECTION		**APPOINTMENT**		**MERIT SELECTION**			
Partisan	**Non-Partisan**	**By Legislature**	**By Governor**	**Legislature Influences Commission**	**Governor Influences Commission**	**State Bar Influences Commission**	**Sta Co Com**
Alabama	Arkansas	South Carolina	California	Connecticut	Arizona	Oklahoma	A
Illinois	Georgia	Virginia	Maine	District of Columbia	Colorado	South Dakota	Ir
Louisiana	Idaho		Massachusetts	Hawaii	Delaware	Tennessee	K
New Mexico	Kentucky		New Hampshire	New York	Florida		M
Pennsylvania	Michigan		New Jersey	Rhode Island	Maryland		Ne
Texas	Minnesota			Vermont	Utah		Wy
West Virginia	Mississippi						
	Montana						
	Nevada						
	North Carolina						
	North Dakota						
	Ohio						
	Oregon						
	Washington						
	Wisconsin						

APPENDIX 2. [BAR RETENTION RATINGS] TO COME

APPENDIX 3 PANELS SUBMITTED TO GOVERNORS SINCE 1989

Governor Bob Holden

* September, 2004 - Nannette A. Baker (D), Mary Rhodes Russell (D), Clifton M. Smart III (D)
* February, 2002 - Michael W. Manners(?), Clifton M. Smart III (D), Richard Teitelman (D)
* February, 2001 - Richard Teitelman (D), Mary Rhodes Russell (D), Laura Stith (D)

Governor Mel Carnahan

* August, 1998 - Michael Wolff (D) , Richard Callahan (D), Michael W. Manners (?)
* October, 1995 - Ronnie White (D), Dale Doerhoff (D), Gene Hamilton (D)

Governor John Ashcroft

* August, 1992 - Stephen Limbaugh (R), Carl Esbeck (R), Robert Dowd Jr. (D)
* February, 1992 - John Oliver (D), William Price (R), Ernest Webber (D)
* September, 1991 - Robert Ulrich (R) , Elwood Thomas (R), Richard Webber(D)
* August, 1991 - Charles Seigel (?), E. Richard Webber Jr.(R), Duane Benton (R)
* October, 1989 - Gerald M. Smith (?), John C. Holstein (R), Richard Webber (D)
* 1989 - Ann Covington (R)
* 1985-Robertson (R)