



Those Who Know Say Missouri Plan Has Merit

By Andy Roberts
 The Daily Record

They call it the Missouri Plan because that's where it originated.

It's also known as the Merit Plan, because that describes it.

The Missouri Plan is Nebraska's system of nominating, appointing and retaining judges, and for many who have seen it in action, including some who were around before it became law, the system has worked extremely well.

Or, to put it another way, the Show-Me State, has "showed us" how to do it.

Today, attorneys apply for a judgeship when a vacancy occurs. Their applications are reviewed by a judicial nominating committee in their district – which includes lawyers appointed by the Nebraska State Bar Association, four non-lawyers appointed by the governor and chaired by a nonvoting Supreme Court justice. No more than two of the lawyers or two of the non-lawyers can be members of the same party.

To apply, an individual must be 30 years old, a U.S. citizen, have practiced law in Nebraska for at least five years and be admitted to practice before the Nebraska Supreme Court.

Following interviews the commissioner forwards the names of at least two qualified individuals to the governor. The governor then selects the next judge, who stands for a retention vote in the first election after they have been in office at least three years and every six years after that.



Judge Leigh Ann Retelsdorf (left) administers the judicial oath to Shelly Stratman. Both judges were appointed by Gov. Heineman.

The system was introduced in Nebraska in 1962 for Supreme Court and district court judges. It has since been expanded to include all judges.

Dick Fellman is a retired attorney and former state senator who also was Douglas County Board chair and now serves as an adjunct professor of political science at UNO. He remembers the early days of his legal career before the Missouri Plan.

When Fellman began practicing law in 1960, Nebraska still elected most judges. The young attorney's employer gave him a list of attorneys to call for contributions to a judge's campaign. The request, he recalled, was for \$25.

"That's a long way from what happens today," he sighed.

Retired Creighton Law Professor Dick Shugrue (who writes commentary for *The Daily*

Record) said the current method is based on the system that had worked well in Missouri.

"Nebraska's one of the states that has 100 percent merit selection of all the judges," Shugrue stated. Some states, he said, use the system only for part of the judiciary.

The public has its input as voters go to the ballot box for retention elections. Omaha Bar Association President Stu Dornan said a survey of attorneys is used to provide some measure of a judge's performance. That survey is conducted by the Nebraska State Bar Association, Dornan pointed out, and involves confidential questionnaires that are sent to Bar Association members and include a section for comment. Attorneys receive the results in the mail and the NBA makes it available to the general public in other ways.

"The anonymity of it is, of

course, very good.” Dornan said. “It’s designed where you are only supposed to rate judges you appear in front of.”

Those three men, who know the merit system well, and Nebraska Gov. Dave Heineman, who appoints the state’s judges, shared their thoughts on Nebraska’s

system of selecting and retaining judges.

One problem with simply electing judges is, as Shugrue put it: “The guy [or woman] might be a great politician and a lousy judge.”

Electing judges, Shugrue See MISSOURI PLAN, page 6

Missouri Plan

pointed out, can allow a good campaigner to get a lifelong term based on their campaign ability and political connections.

“Where there is election of judges, there is a huge, huge problem of raising money,” he stressed. That leads to problems with the ability, or inability, of the person seeking the judgeship to maintain the appearance of impartiality when money must be raised from attorneys, litigants or corporations.

“If you can avoid that debt element in the selection of judges you have the appearance of a far fairer system,” he said.

Dornan, in many ways, echoed what Shugrue said.

“I’ve lived in states where judges are elected,” Dornan recalled. “You then have the issues of securing funds to run your campaign and making campaign promises.”

Judges should remain neutral as much as possible, he stressed.

“Their job is to be the judge and do it right,” Dornan emphasized. “And not worry about their opponent at the next election taking that [their work] and putting it on a postcard and delivering it to their constituents a week before the election.”

Among the considerations in selecting a judge, Shugrue said, are a person’s ability to deal with the courtroom atmosphere and to appear to be fair, and their knowledge of the law.

“You’re talking about the ability to have a judicial temperament,” Shugrue added. “The ability to get the opinion out with all deliberate haste.”

The advocates, he pointed out, really like the system.

But: “There are people of good will who think it’s a lousy system. ... They think the voters should

Nebraska Governor Dave Heineman’s Judicial Appointments

Of the 68 judicial appointments that have been made by Nebraska Gov. Dave Heineman during his nearly 10-year tenure, 38 of them were chosen from among both men and women applicants advanced from the Judicial Nominating Committees. Of the 38, 18 were women. The other 30 of the appointments included only men applicants advanced from the committees.

In the Fourth Judicial District, in both District and County Courts, 13 judges were appointed:

- The Honorable Susan M. Bazis
- The Honorable W. Russell Bowie III
- The Honorable Timothy P. Burns
- The Honorable Duane C. Dougherty
- The Honorable Thomas K. Harmon
- The Honorable Marcela A. Keim
- The Honorable Sheryl L. Lohaus
- The Honorable Craig Q. McDermott
- The Honorable Kimberly M. Pankonin
- The Honorable Marlon A. Polk
- The Honorable Leigh Ann Retelsdorf
- The Honorable Shelly R. Stratman
- The Honorable Derek R. Vaughn

High Court Appointees:

Nebraska Supreme Court:

- Chief Justice Michael G. Heavican
- The Honorable William B. Cassel

Nebraska Court of Appeals:

- The Honorable Michael W. Pirtle
- The Honorable Francie C. Reidmann

have more of a say and [the process] not left to 'the elite.'"

Shugrue also sees problems with the current system, as judges have a difficult time putting up a defense when a campaign has been organized against their retention.

He pointed to the 1996 campaign that resulted in then-Supreme Court Justice Dave Lanhier losing a retention election. That vote followed court rulings that struck down a voter-approved term limits amendment and another that reinserted malice as an element of second-degree murder, overturning a number of convictions.

Fellman also was disappointed in the vote against Lanhier, calling it a bad idea, but pointing out he was the only justice up for retention that year.

"I think if there was a straight-up election as in some states, the whole court would have lost," Fellman said.

In another case of judges being removed from office, there were the three Iowa Supreme Court justices who were not retained in 2010 after their decision a year earlier that allowed same-sex marriage in the state.

"You may have some forces

with a lot of cash," Shugrue said. "It's hard for that person, as a judge, to answer those ads."

That judge may not have the money to run ads, while for many others it's not seen as appropriate for a judge to respond. On the other hand, Shugrue said, sometimes if the lawyers appear to be after a judge, the public thinks the judge must be doing something right.

"There are problems with merit selection today," he conceded, but pointed out that only a handful of judges have been recalled.

Dornan thinks retention votes and the process of providing Bar Association ratings makes a difference.

"It's really the only way to hold the judges accountable to the Bar," he said.

"Those survey results are published and if there's a judge who's not well regarded, that does become public.

"It's up to the public to look at that and decide how much weight they want to put on that."

For Fellman, his memories of the old days make the Merit System even more appealing. He added another story to his earlier tale of requesting campaign donations.

As a young attorney he went to the office a couple weeks before Christmas and found a big grocery carton. The carton contained about a dozen bottles of various kinds of liquor and a different judge's name on each bottle.

Fellman's task was to deliver the bottles to the designated judges.

"I remember feeling very foolish," he said, recalling how he walked up the sidewalk and then the walkway to the courthouse, passing the Salvation Army tree with a bottle for each of the judges.

"It was as if which particular brand [was chosen according to what] each particular judge liked.

"Now that, too, has been done away with," Fellman said, adding that the judges did look at the gift bottle to see who had provided it.

"I just felt like a fool," he said. "I'm sure I wasn't the only one."

In a statement to *The Daily Record*, Nebraska Gov. Dave Heineman said he believes the merit system works well, and he takes the responsibility of appointing judges "very seriously."

Heineman said he has appointed 68 judges, including the chief justice of the Nebraska Supreme

Court and two judges on the Nebraska Court of Appeals. The Governor listed the key qualifications as judicial philosophy, judicial temperament and legal experience.

"Nebraska has an excellent system of nominating judges, involving both lawyers and non-lawyers," the Governor said in a statement. "The Judicial Nominating Committees do an admirable job of reviewing the applicants and forwarding me the most qualified individuals."

Heineman explained that his decision process involves reviewing the judiciary documents about each candidate, letters of support and an interview.

"I work hard to select judges who will interpret the law rather than make the law, who will be fair and impartial, and who have exceptional judicial temperament," he said. "Nearly half of the time, I have appointed female judges when the applicant pool contained both men and women."

While not perfect, the supporters appear to outnumber the detractors.

Or, as Fellman put it: "I would not want to go back to the old system."