

VOTERS GUIDE: Amendment 3 would give governor more say in selecting judges

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BY [RAYMOND HOWZE](#)

COLUMBIA — Missouri voters will decide in November whether to give the governor more influence in the appointment of Missouri Court of Appeals and Supreme Court judges.

Known as Amendment 3, the measure would allow the governor to appoint two commissioners to the [Appellate Judicial Commission](#) as soon as his or her four-year term begins. The governor would then be allowed to appoint two more commissioners midway through his or her term, giving the governor four of the commission's seven members.

Amendment 3 Q&A

Q: What does the amendment propose?

A: It would allow the governor to appoint four of the seven members to the Appellate Judicial Commission within one four-year term.

Q: How does this differ from the current system?

A: The governor now appoints one commissioner every two years.

The amendment would replace the one state Supreme Court judge on the commission with a retired, nonvoting judge.

The Appellate Judicial Commission is a group of seven people that helps fill vacancies in the Missouri appellate and Supreme courts. Members propose three nominees to the governor for open judicial positions, and the governor can then determine whether he or she wants to appoint one of those nominees to that open position.

commissioner every two years. Under Amendment 3, the Appellate Judicial Commission would still exist, but the governor would have majority control of the commission. The governor could appoint two commissioners to the Appellate Judicial Commission as soon as his or her four-year term begins. The governor could then appoint two more commissioners midway through his or her term, giving the governor the right to appoint four of the commission's seven members within a first term as governor.

Q: What are the different types of systems?

A: Missouri Plan (13 states): Judges appointed by governor after Appellate Judicial Commission nomination. They stand for retention elections by the public after their first terms expire.

Hybrid (10 states): Judges appointed by governor after Appellate Judicial Commission nomination but also need confirmation from a democratic body.

Election (22 states): Judges are elected by popular vote.

Democratic appointment (five states): Judges appointed directly by a public vote or appointed by governor with advice and consent of

The seven commissioners are divided into three categories: three attorneys elected by members of The Missouri Bar, three nonlawyers appointed by the governor and one state Supreme Court judge.

The debate

Opponents of Amendment 3 say the change would politicize the selection of judges. Skip Walther, a Columbia attorney and treasurer of [Missourians for Fair and Impartial Courts](#), said the amendment would make the governor the most powerful person in the judicial selection process.

"Of the seven people on the commission, the governor gets to pick one or two," Walther said. "He doesn't have much of an ability to influence the commission. But under the new amendment, he almost immediately gets to select four of the seven — meaning the governor is given the power to completely control judicial selection."

Currently the governor appoints one commissioner every two years. If the governor were elected for two terms, he or she could appoint three or four members. Walther said that under Amendment 3, the Appellate Judicial Commission would still exist, but if the

a separate group (similar to the federal system).

Source: *The Federalist Society's statecourtsguide.com*

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amendment passes, the commission would be completely controlled by the governor's office.

The current judicial selection process took effect Jan. 1, 1942, after voters approved it in 1940.

Missouri has since served as a model for other states: Twelve states follow what is called the "Missouri Plan," while 10 have a similar hybrid-type of system, according to

statecourtsguide.com, a website created by The Federalist Society. Twenty-seven states have a system that allows for some influence from a voting democratic body.

Proponents of the amendment say that it would reduce lawyers' influence over the selection commission and that putting the governor in charge would allow voters to hold someone accountable, according to [Focus St. Louis](#).

State Sen. Jim Lembke, R-St. Louis County, has sought to change the judicial selection process for the past seven years. He sponsored the bill that led to the amendment being placed on the Nov. 6 ballot. Lembke calls the amendment a "modest proposal."

"It will allow the people to hold someone responsible for who the judges are in the highest levels of our state," Lembke said. "With these changes, they can point to the governor and say: 'You're responsible for putting four of these people on the commission.'"

Walther said the amendment could allow campaign contributions to politicize the selection of judges.

"The guy who contributed the money to the governor's campaign then might tell him who to nominate," Walther said. "It turns our nonpartisan process into a circus under control of the governor. That's not what it was originally designed for."

Walther said Missouri's system is based strictly on merit.

"When they're sitting there in judgment for a case, and they're there because of their credentials, they're going to make a decision based solely on their interpretation of the constitution and the law, not because of partisan politics," Walther said.

The amendment's potential impact

MU law professor Joshua Hawley agreed with Lembke that the amendment would be a modest change.

"It's a relatively minor tweak of the overall structure of the plan," Hawley said. "It re-balances the scale, over time, to the governor."

Hawley said it will take time to see the true effect of the amendment's change because it realistically will take two terms to see the governor's influence grow significantly. It's not until the governor's third year that he or she could appoint two more members to the commission.

James Harris, executive director for Better Courts for Missouri, said the amendment would create more transparency and accountability surrounding the commission. Because the governor is elected by the people, they can hold him or her accountable for the appointments.

But Hawley said the governor's decisions wouldn't come into play until he or she is seeking re-election.

Hawley said the original intent of the Missouri model was to remove the influence of politics from the appointment of appellate and state Supreme Court judges.

"I think that folks worry that by giving the governor a majority on the commission, we're putting elective politics back in the nominating process," Hawley said. "It concerns some people, but it's not necessarily a cause for great concern."

The amendment as a compromise

Some see Amendment 3 as a compromise between the current process and the more extreme option of allowing voters to directly elect appellate and state Supreme Court judges. As it stands, those judges in Missouri are subject only to retention votes by the public after their first terms expire.

Harry Wyse, a Democrat running for Missouri's 7th District seat in the Missouri House of Representatives, said Amendment 3 wouldn't change much immediately, but he sees it as a possible step toward direct elections.

"If you give it some time and claim it to be ineffective, then you can give it a wholesale change," Wyse said. "It's the molasses on the stick — something that will create something bigger."

A [2001 study](#) by [Greenberg Quinlan Rosner Research](#) found that 46 percent of state judges that are subject to election felt pressure to raise money for their campaigns, especially in election years. The study also found that only 13 percent of American voters "had a great deal of information about candidates in judicial elections."

The study also found that 90 percent of voters and 87 percent of judges said they were concerned that "because voters have little information about judicial candidates, judges are often selected for reasons other than their qualifications."

Wyse said the fact that judges and voters have little interaction is problematic when it comes to giving voters a role in selecting them. He noted that criminals and lawyers are the only people who have regular interaction with judges.

"I know the judges in my county through personal acquaintances, but the average person doesn't have the opportunity to meet a judge or even know a judge," he said.

The partisan election effect

The effect of partisan elections for appellate court judges was most evident in West Virginia in the 2009 U.S. Supreme Court case, [Capperton v. A.T. Massey Coal Co. Inc.](#) The case dealt with Hugh Caperton, president of Harman Mining Co., who sued A.T. Massey Coal Co. in 1998, alleging that the company fraudulently canceled a coal supply contract with Harman Mining and caused the company to go out of business. A Boone County, W.Va., jury ruled in 2002 in favor of Caperton and awarded him \$50 million in damages.

Two years later, A.T. Massey CEO Don Blankenship contributed more than \$3 million to lawyer Brent Benjamin, who was running against incumbent West Virginia Supreme Court Justice Warren McGraw. The \$3 million was among the highest contributions Benjamin received. McGraw lost the election.

In subsequent appeals of the Harman-A.T. Massey case, Benjamin was among five judges who heard the case. He voted in 2007 and 2008 to overturn the \$50 million verdict in two separate 3-2 votes.

Caperton claimed his right to a fair and impartial trial had been violated because of the 2004 campaign contributions. The case was appealed to the U.S. Supreme Court, which agreed with Caperton and ruled that Benjamin should have recused himself from the case because his interest posed "a risk of actual bias."

Walther said that case was an example of how companies can influence court cases and is one reason the amendment's proponents want to be able to select judges. Walther said it could result in companies having an influence on current "hot-button issues" such as birth control and health care.

"It's so that the judges will rule the way they (the companies) want them to rule," Walther said. "Our judiciary is insulated from that control because of the commission."

Lembke, however, said that just because the process has been around for years doesn't mean it's necessarily working.

"We've been trying to change it for years," Lembke said. "Many who model after Missouri have since changed or tweaked their plans."

Supervising editor is [Scott Swafford](#).

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