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State Judicial Selection: Once More Unto the Breach

*By Michael E. DeBow**

Another election season approaches and with it the debate over the proper mechanism to select state judges. This has been a recurring debate in American politics, and today's critics of judicial elections show no sign of fatigue. The ABA and various state bar associations, the American Judicature Society, and quite a few academic and judicial critics have recently been joined by retired Supreme Court Justice Sandra Day O'Connor in the attack on judicial elections.[1] This article offers, by contrast, a look at the seldom-heard arguments *in favor* of electing judges, and raises significant questions about the alternatives urged by some of the critics.[2]

Money Worries, Mostly

The case against electing judges is based largely on the supposedly corrosive effects of campaign fundraising in the context of judicial elections. Judicial candidates in elective states typically have to raise money to run, and the amounts raised in some states have risen dramatically over the past decade or so. Critics point to this phenomenon and the worry about a related loss of public confidence in judicial integrity. The public, it is said, will come increasingly to doubt that a judge who had to raise large amounts of money can be impartial in deciding cases involving contributors—both parties and attorneys—who appear in court.[3]

This argument obviously should not be dismissed summarily. The effect of judicial candidate fundraising may be to raise doubts about judicial impartiality. However, this does not mean that the solutions urged by the critics will actually improve matters on net. The question, as always, should be: Will the cure be worse than the disease?

While the worry about fundraising dominates the case against judicial elections, the critics sometimes make other arguments as well. Some worry about the increased level of issue-oriented debates in judicial campaigns—especially involving hot-button issues such as the death penalty and same-sex marriage. This concern about increased partisanship in judicial electioneering was boosted by the Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*, which struck down a common form of state regulation of judicial candidates' speech.[4] Increasingly, candidates for state judicial office are quizzed on their position on issues of interest to voters. This fact worries the critics. At an August 2006 meeting of the Conference of Chief Justices, the chief justice of Indiana, Randall Shepard, summed up this position: "It's the money, it's the judicial questionnaires, it's a whole constellation of things happening now that don't advance the public's confidence in the courts."[5]

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The critics are discussing a fairly wide range of reform options, some of which have more merit than others.[6] My purpose here is limited to challenging the idea that appointment of judges followed by "retention" elections, or "non-partisan" election of judges, would be preferable to the election of judges in partisan races.[7]

How Meritorious is Merit Selection?

Merit selection of judges typically involves some form of the following mechanism: A judicial nominating commission reviews the bona fides of those lawyers and judges who wish to be considered for judicial offices, and sends a short list of potential nominees to (typically) the governor, who then chooses one of the listed candidates for the job. The legislature may or may not be involved in confirming the governor's choice. Typically, an incumbent judge in a merit selection state who wishes to remain in office runs for reelection in a "retention" election, where he does not face an actual challenger. Instead, the ballot asks voters to answer yes or no to the question, "Should Judge X be retained in office?"

As the term implies, merit selection is thought by its supporters to result in more qualified and otherwise "better" judges than electoral selection. There is just one hitch to this—there is virtually no empirical support for this claim. There is a large body of social science research on state supreme courts and it shows that there is no real, observable difference between the judges chosen in merit selection states, and those chosen in the other states.[8] Judges from State A tend to look and act almost the same as judges from States B through Z—regardless of how they are selected or retained. In other words, a given state's choice between merit selection and partisan election does not seem to have any discernible effect on the kinds of people chosen for the bench, or their performance on it.

Merit selection advocates thus cannot point to any compelling evidence in favor of their preferred method. In addition, one finds controversy and debate over the actual operation of merit selection in some of the states that have adopted it; including, ironically, Missouri, where merit selection originated.[9] Dissatisfaction with the reality of merit selection (as distinct from the good-government vision promoted by its partisans in other states) stems from the fact that it is impossible to remove "partisan" politics from the judicial selection process, no matter which selection mechanism is used. Because the judicial nominating committee plays such a strong role in merit selection, private interest groups—including, most prominently, the plaintiffs' bar and the business community—try to get "their" representatives named to the committee and then try to dominate the committee's work. A *Wall Street Journal* editorial on the Missouri situation summed up the point well: "The Missouri plan was originally seen as preferable to a system directly electing judges, which in other states has left sitting judges beholden to the wealthy trial lawyers who are their

biggest campaign donors. But as the current case has shown, special interests are no less involved in the state's selection process—the only difference is that this now happens behind closed doors."[10]

Merit selection, soberly viewed, is far from a magic bullet solution to the problems posed by partisan election. Merit selection carries with it the potential for just as broad a field of play by private interest groups as in electoral politics, and brings with it a new downside in the form of decreased transparency to the public. Closed-door meetings as the alternative to electoral politics probably does not sound like a particularly good trade for many voters, particularly once it becomes clear that the lawyer-members of nominating commissions are likely to dominate the discussion. To put it another way, the lack of political pressure to move in the direction of merit selection in most election states is probably best explained by broad public resistance to the idea of relinquishing a democratic vote in favor of rule by an appointed nominating committee meeting behind the scenes and dominated (in all probability) by its lawyer members.[11]

How Non-Partisan Are Non-Partisan Judicial Elections?

This selection mechanism involves having multiple candidates run against one another, but without identifying themselves by political party. Such "non-partisan" races are used in a number of states; however, as with merit selection, the proponents of this type of reform cannot point to any evidence that their favored method of selection makes any difference in the quality of persons ascending to the bench. Professor Melinda Gann Hall summarized the evidence on this point in her 2001 presidential address to the American Political Science Association:

> Court reformers argue that partisan elections fail to evidence accountability, while nonpartisan and retention elections promote independence. Thus, issue-related or candidate-related forces should not be important in partisan elections, and external political conditions should not be important in nonpartisan and retention elections. *Results indicate that reformers underestimated the extent to which partisan elections have a tangible substantive component and overestimated the extent to which nonpartisan and retention races are insulated from partisan politics and other contextual forces. On these two fundamental issues, arguments of reformers fail.*[12]

This passage states the majority view among political scientists on this comparison.

In addition to having nothing particularly positive in its favor, the proposal to substitute non-partisan for partisan elections, like merit selection, carries with it a distinctly anti-democratic flavor. The essence of the proposal is to deny the public a relevant piece of information—the party identification of judicial candidates. Presumably this denial stems from the conviction that party membership ought not to matter when it comes to judicial candidates. In a perfect world this would be true. But, for better or worse, a candidate's self-identification as Republican or Democrat likely carries some information as to the candidate's philosophy of judging—his choice between textual and non-textual theories of Constitutional and statutory interpretation, or his understanding of the role of government and the relations among the three branches of state government. While it would be nice if this were not the case, many voters think it is true. It is remarkably condescending and paternalistic to say that voters should be denied party ID in judicial races, and would raise substantial First Amendment issues (especially after *White*) if applied to candidate advertising.

Finally, it must be noted that some of the most contentious of the recent battles over control of state supreme courts occurred in states with non-partisan elections. Georgia is a stand-out on this point, viewing the 2006 election cycle.[13] At a minimum, the recent experience of non-partisan states should raise significant doubts about that format's capacity to improve judicial selection.

Can Anything Be Said in Favor of Partisan Elections?

The observant reader has noticed, no doubt, that the article thus far has been devoted to pointing out the shortcomings of the alternatives to partisan judicial elections. As it happens, there is a positive case to be made for partisan elections as well.

Perhaps the biggest argument in favor of electing judges was alluded to in the quote from Professor Hall. She explains that supporters of judicial election often speak in terms of promoting judicial accountability, while critics of judicial election speak in terms of promoting judicial independence. I will follow this convention, with one modification: I will speak in terms of judicial integrity rather than judicial independence. This is because, as we have seen, the current critics of judicial elections tend to emphasize the threat to judicial integrity—or the appearance of judicial integrity—posed by the need to solicit campaign contributions in such a system. Judicial independence, on the other hand, is properly understood as dealing with the relations among the judicial, legislative and executive branches of a state (or the national) government.[14] Accordingly, the critics' argument is that the alternatives to partisan elections will better promote judicial integrity than will partisan elections.

The counter-argument is that partisan elections better promote judicial accountability to the public than do the alternative mechanisms. To be sure, partisan elections do not guarantee perfect accountability to the public for any number of reasons. However, the amount of public input in a partisan election system is vastly greater than in a merit selection system, and at least somewhat greater than in a non-partisan election system. Unless one takes the position that accountability to the public is *per se* a bad thing in the case of judges, this must be reckoned on the positive side of the ledger for partisan judicial elections.

In my home state of Alabama, voters saw a series of hard-fought partisan campaigns for the state supreme court, beginning in 1994. As a result of the choices made by the voters, the Alabama Supreme Court was transformed, and now reflects more nearly the conservative views of most Alabama voters.[15] I would argue that voters in any particular state should not be saddled with a judiciary that is significantly out of step with the majority on such matters as tort reform, the death penalty, public school finance, or same-sex marriage. Judicial

accountability via partisan elections is one way the majority may escape judicial tyranny on questions such as these.

The ultimate question is the apparent trade-off between judicial accountability and judicial integrity. A state may increase the public's perception of judicial integrity by removing the appearance of impropriety involved in judicial campaign fundraising, but this comes at the cost of further insulating sitting judges from public accountability for their job performance. Conversely, a state may increase public accountability of judges by subjecting them to partisan reelection contests, but this comes at the cost of raising some doubt in the minds of the public as to whether the judges' impartiality and integrity have been compromised in the pursuit of campaign contributions. Reasonable people can, and do, differ on this question.

Indeed, both sides in the debate would do well to remember the difficulty of nailing down with any precision either side of the relevant trade-off—that is, the appearance of judicial integrity and the value of judicial accountability. Humility, caution, and openness to new data are all called for here.[16]

Destroying the Village in Order to Save it

And yet, some of the proponents of reform in Alabama have reminded me of the unnamed U.S. commander in the Vietnam War who allegedly said that his unit had to destroy a village in order to save it from the Viet Cong.[17] Some critics' characterization of partisan judicial election campaigns seem to me to come very close to disparaging the impartiality and integrity of sitting judges. Rhetorically speaking, it is a very short step from alleging the "appearance of impropriety" to appearing to allege impropriety itself. It will be—at the least—ironic if one of the results of the critics' campaign is the smearing of the image of the judiciary in the minds of the public, when the critics' stated purpose is to protect the image of the judiciary in the minds of the public.

One example of this problem will suffice. In its Sunday, October 8, 2006 edition, the *Birmingham News* managing editor picked up on a quote from an Ohio supreme court justice reported in the *New York Times*: "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race." The editorial argued that Alabama should scrap partisan judicial elections, and was accompanied by an editorial cartoon showing a judge, wearing a robe and holding a gavel, standing next to a streetwalker under a street lamp, saying "Buzz off sister! This is my corner." Of course, if you parse the Ohio judge's statement, you will see he did not say he was a prostitute, only that he felt like one—but that nuance is gone in the editorial cartoon. Such criticism—or, rather, ridicule—may well encourage some Alabama voters to think that the states' judges are corrupted by the current selection process. That would be a real shame, and a disservice to both the courts and the citizens of the state. Responsible critics of partisan elections clearly ought to avoid this kind of destructive, incendiary rhetoric.

The Elephant in the Living Room

Opponents of partisan elections sometimes adopt a fairly strident tone in their attacks on judicial elections. One common refrain is that they do not wish to see the public think of judges as legislators. Indeed, much of the rhetoric of the reformers has to do with preserving the unique status of judges as functioning above and outside of politics. This is all well and good, except that some judges *do* make choices that strike members of the public as more political than judicial. To the extent that judges act like legislators, it can be argued that it is proper that they be chosen as legislators are chosen—in partisan electoral contests. Many judges and law professors have adopted a results-oriented conception of judging that applauds judges who consciously push public policy through their decisions.[18] Some partisans of judicial activism likely do not wish to debate the issue in an electoral setting, and this attitude may well account for some of the objection to judicial elections.[19] Such squeamishness is, however, not sufficient reason to take the issue of judicial philosophy out of the public arena by making judicial selection less transparent and less democratic via merit selection or nonpartisan elections.

Consider same-sex marriage. If judges on a state supreme court are presented with the matter, some voters—likely a majority—will see this question not as one of abstract "interpretation" of the state constitution's due process clause (for example), but rather as a political choice. Or consider school finance. If judges on a state supreme court are asked to mandate increases in state spending, or redistribution of state funds among school districts, some voters—likely a majority—will see this as politics rather than judging. The same will likely hold true for quite a few other issues, including abortion, gun control, and tort reform.

Judges may avoid this sort of voter reaction by refraining from acting like legislators. But, to the extent they act like legislators, judges should expect voters to consider them in the same light—and properly subject them to the same kind of accountability —as legislators. The proper connection between majority rule and the judicial function deserves to be at the center of all discussion of judicial selection.

Endnotes

1 In October 2007, the Sandra Day O'Connor Project on The State of the Judiciary at the Georgetown University Law Center sponsored a day-long conference on "The Debate Over Judicial Elections and State Court Judicial Selection." Most of the speakers seemed to me convinced that there is some sort of crisis in state judicial selection that should be addressed by one reform program or another. The conference webpage contains a good deal of background material and a video of the conference itself, http://www.law.georgetown.edu/judiciary/.

2 This article is designed to update *Federalist Society White Paper, The Case for Partisan Judicial Elections*, 33 U. Tol. L. Rev. 393 (2001).

3 For an example of the genre, see Sandra Day O'Connor, *Justice for Sale*, Wall St. J., Nov. 15, 2007, p. A__. The Annenberg Public Policy Center of the University of Pennsylvania surveyed 1,514 people on their views of the federal and state judiciaries, and released the results in conjunction with the conference described in note 1. *See Partisan Judicial Elections Foster Cynicism and Distrust*, Oct. 17, 2007, *available at* http://www.annenbergpublicpolicycenter.org/.

4 536 U.S. 765 (2002).

5 Quoted in Tony Mauro, *Chief Justices Sound Alarm on Judicial Elections*, Legal Times, Aug. 23, 2006, *available at* http://www.law.com/jsp/article.jsp?id=1156248911451.

6 *See, e.g.,* the list of recommendations made by the O'Connor Project at the close of the conference described in note 1, *at* http://www.law.georgetown.edu/judiciary/documents/Recommendations.pdf

7 The recommendation to drop partisan elections was the seventh, and final, item in the list of recommendations adopted by the O'Connor Project, cited in note 6.

8 An overview of this research literature as of 2001 can be found in *Federalist Society White Paper, supra* note 2, 33 U. Tol. L. Rev. at 398-99. For a more current discussion reaching the same basic conclusion, see Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, John M. Olin Law & Economics Working Paper No. 357 (U. of Chicago, Aug. 21, 2007), https://www.law.uchicago.edu/files/357.pdf. This paper concludes that "there is little empirical evidence" for the view that "appointed judges are superior to elected judges," but also concludes that the "evidence does not prove that elected judges are superior to appointed judges."

9 The term "Missouri plan" is often used as a synonym for "merit selection."

10 Editorial, *Show Me the Judges*, Wall St. J., Aug. 30, 2007, A10. For an extensive discussion of recent developments in Missouri, see William G. Eckhardt & John Hilton, *The Consequences of Judicial Selection: A Review of the Supreme Court of Missouri, 1992-2007* (Federalist Society, 2007), http://www.fed-soc.org/doclib/20070801_FedSocMissouriWhitePaper.pdf. For the controversy over merit selection in neighboring Kansas, see Stephen J. Ware, *Selection to the Kansas Supreme Court* (Federalist Society, 2007), http://www.fed-soc.org/publications/pubID.441/pub_detail.asp.

11 In the Annenberg study cited in note 3, respondents were asked "Which of the following do you think would be better for your state?" The response "Judges run for election and the people vote on the candidates" was chosen by 64%, while "Governors nominate judges from a list of names prepared by an Independent committee made up of Democrats, Republicans and Independents" was chosen by 31%. *See* http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Survey_Questions_10-17-2007.pdf.

12 Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 Am. Pol. Sci. Rev. 315 (2001) (emphasis added).

13 Jill Young Miller, *Hunstein Wins Supreme Court Race*, Atlanta Journal-Constitution, Nov. 8, 2006, http://www.ajc.com/metro/content/shared-blogs/ajc/elections/entries/2006/11/08/georgia_supreme.html.

14 For a thought-provoking essay on the topic, *see* William H. Pryor, Jr., *Not-So-Serious Threats to Judicial Independence*, 93 Va. L. Rev. 1759 (2007), http://www.fed-soc.org/publications/pubid.465/pub_ detail.asp.

15 *See* Marc James Ayers, *Staying the Course: An Update on the Alabama Supreme Court* (Federalist Society, 2006), http://www.fed-soc.org/publications/pubID.91/pub_detail.asp, and Michael DeBow, *The Road Back From "Tort Hell": The Alabama Supreme Court, 1994-2004* (Federalist Society, 2004), http://www.fed-soc.org/publications/pubID.92/pub_detail.asp.

16 For example, a forthcoming article by James E. Alt (of Harvard University) and David Dreyer Lassen (of Copenhagen University), presents evidence that states with elected judiciaries experience lower levels of corruption, which the authors explain in terms of more vigorous checks and balances among the branches of state government in those states. *Political and Judicial Checks on Corruption: Evidence from American State Governments* (EPRU Working Paper No. 2005-12), http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=816045.

17 *See Ben Tre*, http://en.wikipedia.org/wiki/Ben_Tre. Some think the comment apocryphal.

18 In two speeches directly relevant to the question of state judicial selection, Justice William Brennan famously urged state supreme court justices to adopt the judicial philosophy of the Warren Court. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977), and William J. Brennan Jr., *The Bill of Rights and the Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986).

19 Judges probably enjoy criticism about as much as the average person. It is interesting to note that Justice O'Connor has exhibited a certain sensitivity to public criticism of the U.S. Supreme Court. *See, e.g.,* Bill Mears, *O'Connor: Don't call us "activist judges,"* Nov. 28, 2006, http://www.cnn. com/2006/POLITICS/10/27/mears.judicialindependence/index.html.