Professional Responsibility & Legal Education

Electing State Judges: Unpleasant, But Not Unconstitutional

*By Ed Haden & Conrad Anderson, IV**

"States, we don't like your method of judicial selection. In fact, it is downright terrible. But we strike down only unconstitutional laws, not stupid ones. Change it if you want, but it's not our problem." This seems to be the message of the U.S. Supreme Court in its recent decision, *New York State Board of Elections v. Lopez Torres*.[1]

Election of New York's Judiciary

Under the New York State Constitution, justices on the supreme court, that state's trial court of general jurisdiction, are elected to fourteen-year terms in one of the twelve judicial districts. The constitution provides that the candidate selected by each party automatically appear on the ballot with the party's endorsement. While the method for the parties' selection has seen changes, for the past eighty years candidates have been selected by a convention composed of delegates elected by party members.

Under this "convention" selection method, each party holds a delegate primary in which party members elect delegates from each of the state's 150 assembly districts. These delegates then attend the nominating convention in one of the twelve judicial districts where they nominate the party's supreme court candidate to run at large in that district. The selected nominees automatically appear on the general election ballot and may be joined by independent candidates and candidates of smaller political organizations who gain access by obtaining a set number or percentage of signatures.

This system has been widely criticized as leading to corruption and turning New York's trial courts into puppet shows for party bosses. Apparently, party members often do not know enough or simply care little about the delegates who attend the nominating convention. The party bosses organize a slate of delegates in each district who either run unopposed or against poorly funded opponents. A candidate seeking the party's nomination without the support of party leadership would have to organize his or her own slate of delegates, get them elected at the delegate primary, and do this in numerous assembly districts to have meaningful support at the nominating convention. Thus, the candidates favored by party leadership inevitably win the delegate primaries. Once elected, these delegates attend the convention and follow the instructions of the party boss in choosing the district's nominees. Under this arrangement, both the delegates and the nominees tend to be allies of the party bosses, and upsetting the boss can quickly end judicial aspirations, as the respondent before the U.S. Supreme Court found out.

** Ed Haden is an attorney with Balch & Bingham LLP in Birmingham, Alabama, where he is a member of the firm's litigation section and leads its Appellate Practice Focus Group. Conrad Anderson IV also practices in the litigation section of Balch & Bingham LLP in Birmingham, Alabama. Mr. Anderson's practice focuses on intellectual property and business litigation.*

The System Is Unfair If I Can't Win

In 1992, Margarita Lopez Torres, a nominee of the Democratic Party, was elected to one of New York's county courts, which are of more limited jurisdiction than the supreme court. She unsuccessfully sought the party's supreme court nomination in 1997, 2002, and 2003. In 2004, she and a group of voters and other failed candidates filed suit against the New York Board of Elections, the governmental agency in charge of the state's election laws. She claimed that party leaders unfairly used their influence to block her attempts to gain the supreme court nomination because she refused to make patronage hires. She alleged that the state's election method burdened the rights of candidates who were not favored by party leadership because it made it virtually impossible for them to get elected (even though she could still run as an independent, she claimed that there was no realistic opportunity of winning the election as an independent). She further asserted that the law deprived voters and candidates of their right to ballot access and the right to associate in choosing the party's candidates, all in violation of the First Amendment.

The district court enjoined the state's use of the convention system. The Second Circuit Court of Appeals affirmed, holding that Torres had a First Amendment right to a "realistic opportunity to participate in [a political party's] nominating process, and to do so free from burdens that are both severe and unnecessary."[2] According to the court of appeals, the reality was that the judicial districts were subject to "one-party rule" and a candidate had no legitimate shot of winning as an independent. Candidates therefore have a constitutional right to access to the party's convention in the court's opinion.

The Supreme Court Weighs In

The U.S. Supreme Court unanimously reversed the Second Circuit. Writing for the Court, Justice Scalia explained that there is no precedent suggesting a constitutional guarantee of a "fair chance" at winning a party's nomination. While the Court has acknowledged a right to vote in the party's primary, and has invalidated state laws that unduly burden that right, it has not acknowledged any right to run in the primary. Furthermore, even if the Court were to find such a right, New York's signature and deadline requirements are reasonable and survive constitutional scrutiny.

The real concern for Torres and the other respondents, the Court stated, is not that they cannot vote or run in the election, but that the state's convention process does not give them a realistic shot at winning the party's nomination. This outcome, however, is not a result of the state's election laws themselves but, rather, the simple fact that the party leadership is able to get more support for the candidates it favors than an unsupported candidate can gather. The Court explained: "Our

cases invalidating ballot-access requirements have focused on the requirements themselves, and not on the manner in which political actors function under those requirements."[3] Furthermore, although the Court has permitted states to enact laws which level the playing field for "insurgent" candidates, the Court has never required it—such questions as to what is a "fair shot" are up to the legislature, not the Court.

Finally, respondents pointed out that "one-party rule" prevailed throughout several of the judicial districts and argued that the First Amendment must be used to create competition. According to the Court, "This is a novel and implausible reading of the First Amendment."[4] One-party rule, the Court explained, is typically a result of the voters' preference for the party's candidates. Although states can discourage this result, such as by removing party affiliations from the ballot, the First Amendment does not require such competition.

The Court summed up its opinion by stating, "If [New York] wishes to return to the primary system that it discarded in 1921, it is free to do so; but the First Amendment does not compel that."[5]

Cautionary Concurrences

Justice Stevens, joined by Justice Souter, concurred only to make clear that the Court's determination that a law is not unconstitutional does not mean that the Court believes the law is a good one. Quoting former Justice Thurgood Marshall, he stated "The Constitution does not prohibit legislatures from enacting stupid laws."[6]

Justice Kennedy, joined by Justice Breyer, concurred in the judgment, noting that the respondents would have a much stronger First Amendment claim if the parties' convention method were the only way to get on the ballot; but the fact is that it is not—the state also permits candidates to appear on the ballot, albeit without party endorsement, by obtaining a reasonable amount of signatures to a petition.

Justice Kennedy also saw fit to close with commentary on the propriety of having an elected judiciary. He noted that it is difficult to reconcile having elected judges with the goal of having an independent judiciary, and while states are not prohibited from electing judges, they should strive to find methods of selecting a qualified judiciary and should demonstrate an actual concern for such independence. Although conceding that the laws were not unconstitutional, Justice Kennedy proclaimed, "If New York Statutes for nominating and electing judges do not produce both the perception and the reality of a system committed to the highest ideals of the law, they ought to be changed and to be changed now."[7]

To Elect or To Appoint?

The Supreme Court's opinion seems to suggest, in part, that while allowing people to elect judges has distasteful effects, the Court is not going to deny the people that right. Moreover, while States' methods of judicial election may not be unconstitutional, they are not necessarily something to be proud of. The Court's decision raises, once again, an oft-debated question: Are elected judges a good thing? And if electing judges is a good thing, what is the best way to do that?

Those in favor of election suggest that it produces accountability—judges must make decisions that are in line with the expectations of the public at large if they want to be re-elected. Elected judges, they suggest, are not beholden to the relative few that put them behind the bench through legislative or gubernatorial appointment, but rather are responsive to the community in which they preside.

Opponents of electing judges urge that the selection of these few and powerful persons with such significant responsibility is a decision that should be left to the "experienced elite," rather than the masses. Appointment, they suggest, leads to independence and allows a judge to apply the law in a neutral manner without concern for any special interests that may have funded the judicial campaign. Of course, this ignores the reality that those who do the appointing have selected a particular judge for a reason, and while a judge may not have any political affiliation or aspiration, those who do the appointing often do. It is no secret that appointments are often a result of the perceived political views of the appointee. If the judge is periodically reviewed, he or she may be beholden, as one who is elected, only to a smaller and more powerful group of people.

Providing life tenure may prevent a judge from becoming beholden to the electorate or to those who appointed him or her. With no review and no re-election, the judge would seem to have the independence to decide the law without any outside pressure. Of course, providing such independence can leave unchecked the ambition of judges to enhance their notoriety by solving social problems, running executive agencies, and striking down legislation they personally find distasteful. While deferring to the text and plain meaning of constitutions and statutes exemplifies professional integrity and the judicial function, it does, after all, allow the political branches to exercise most of the power and be more important. Because history has shown that men and women are not angels, a check can be more useful than professional integrity in protecting the rule of law. Sometimes judges whose job is not in jeopardy have a desire to "leave their mark" on the law, such that they become "legal creators" rather than "legal interpreters."

State Judicial Selection Methods

Left with the choice, most states have chosen to use some form of an elected judiciary. The methods for selection are varied.

Twenty-two states provide for the direct election of judges, seven of them in partisan contests. In those states, a party's nominee is selected either through a primary or convention and appears on the general election ballot with the party's endorsement. In the other fifteen states that have direct elections, party affiliation is not noted on the general election ballot, even though, in most instances, the nominee was selected through a partisan primary or convention. "Nonpartisan" does not necessarily mean non-political, however. In the recent non-partisan election for a seat on the Wisconsin Supreme Court, the Associated Press reported, "Democrats and labor groups… along with 220 judges and groups representing more than 18,000 law enforcement officers" supported the losing incumbent, while "Republicans

and the majority of the state's district attorneys and sheriffs" supported the challenger.[8]

Other states employ a so-called merit selection system, a non-partisan method with a goal of selecting judges based on qualifications rather than political affiliation. This system developed from what is known as "The Missouri Plan," and although there is some variation throughout the states employing it, the general procedure is the same. Whenever there is a vacancy, those interested in filling the position submit applications and interview with a non-partisan judicial commission, usually made up of attorneys, citizens, and the chief justice. The commission submits the names of a set number of qualified candidates to the governor for his or her selection. In some states, senate confirmation of the governor's choice is also required. After at least one year in office, the judge's name is placed on a judicial ballot (without party affiliation) of the next general election and voters decide whether the judge continues to serve. The judge must receive a majority of votes in favor of being retained in order to serve the next full term.

In theory, such a procedure combines some of the best aspects of both the appointed and election systems. At least some of the "experienced elite" get to choose the candidate based on qualifications; once elected, however, the judge is accountable to the community and not to those relative few who made the initial selection. In practice, however, there appears to be little accountability because the judges run unopposed in an unpublicized "campaign." The voting public is not as informed about the judge's qualifications or judicial record as they would be if there was an opponent to raise these issues. As such, judges "elected" through merit selection by and large serve as long as they desire. Moreover, studies have shown that judges selected by this method are no better qualified than those elected by the public.[9]

The lack of accountability is evidenced by the fact that in Missouri's seventy-year history, not a single supreme or appellate court judge has lost a retention election. In 2006, only 27.5% of the 192 lawyers participating in a survey recommended the retention of a circuit judge in St. Louis.[10] She was retained. And when a vacancy on the Missouri Supreme Court arose, the Appellate Judicial Commission sent the Republican Governor three nominees who did not appear to fit his desire for a judge who would not legislate from the bench.[11] This has led some of the state's leadership to push for constitutional amendments that would give some control to the legislature. Under "The Accountable Commission Plan," four seats on the nominating commission currently filled by the Missouri Bar Association and the chief justice would be filled by lawyers selected by the state house and senate. Also, rather than the commission nominating a panel of candidates for the governor to choose from, the governor would submit his selected candidate to the commission for approval. Under "The Federal Model for Appointment," the governor would nominate the candidate to be confirmed by the senate. Under a third proposal, "Effective Retention and Removal," the retention vote currently held by the public would be taken and given to elected representatives; judges would be reviewed each decade and must obtain a simple majority of votes to keep their seats.

While Missouri is seeing efforts to get away from this plan, at least one state is trying to join. Last year, the Nevada legislature passed a proposal to amend the state's constitution and adopt a merit based election system. The measure must pass again in the 2009 legislative session to be placed on the general election ballot.

CONCLUSION

After *Torres*, the debate on judicial selection methods will continue, and ultimately be decided by the voters and their state representatives. Until men and women who serve on the bench are angels, democracy will continue to be "the worst form of government, except for all those other forms that have been tried from time to time."[12]

Endnotes

1 128 S. Ct. 791 (2008).

2 462 F.3d 161, 187 (2006).

3 *Lopez Torres*, 128 S. Ct. at 799.

4 *Id.* at 800.

5 *Id.* at 801.

6 *Id.*

7 *Id.* at 803.

8 Scott Bauer, *Wisconsin Justice Ousted in Nasty Race*, Associated Press, Apr. 2, 2008, *available at* http://ap.google.com/article/ALeqM5jqB2r3wafaaNQ-LgAyyPJnP0z7JwD8VP ST702 (last viewed April 28, 2008).

9 Michael DeBow et al., *The Case for Partisan Judicial Elections*, The Federalist Society, Jan. 1, 2003, *available at* http://www.fed-soc.org/publications/PubID.90/pub_detail.asp.

10 Constance Hately, *Judging the Judges*, Am. Spec., *available at* http:// www.spectator.org/util/print.asp? art_id13096 (last viewed April 28, 2008).

11 Gubernatorial dissatisfaction with the nominees that have been submitted is bipartisan. The Democratic Governor of Tennessee has also objected to the nominees that have been submitted to him.

12 Winston Churchill, Address to the House of Commons (Nov. 11, 1947).