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SELECTION AND RETENTION—A JUDGE'S PERSPECTIVE

Robert F. Utter*

“One more thing, gentlemen, before I quit. Thomas Jefferson once said that all men are created equal . . . [but] we know that all men are not created equal in the sense some people would have us believe—some people are smarter than others, some people have more opportunity because they're born with it, some men make more money than others, some ladies make better cakes than others—some people are born gifted beyond the normal scope of most men.

“But there is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. It can be the Supreme Court of the United States or the humblest J.P. court in the land Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.”¹

If all persons are to be treated equally in our courts, the process of selecting judges to oversee courts must be one that insures selection of efficient, intelligent and compassionate judges. It must also be one that insures selection and retention of judges who are truly able to administer, and give the impression that they are administering, their duties impartially to all. Toward this end, the Citizens' Committee on Washington Courts² examined the current process for selecting judges and recommended a constitutional amendment which, if approved, would substantially improve the process by which judges are now selected in Washington state.

* Justice, Supreme Court of Washington; B.S., University of Washington, 1951, LL.B., 1954.

1. H. LEE, *TO KILL A MOCKINGBIRD* 217-18 (1960).

2. The Citizens' Committee on Washington Courts was formed by interested Washington residents in 1966. It consists of citizens throughout the state who have no formal connection with the legal community. An outgrowth of the Committee's 1966 conference was a proposed constitutional amendment creating an appellate court to relieve the Washington Supreme Court of a portion of its workload. This amendment was approved by the voters in November 1968, and the court was subsequently established by implementing legislation.

The Citizens' Committee's proposal for selecting judges is part of a proposed constitutional amendment which would refashion the entire Judicial Article of the Washington State Constitution.³ Section 9⁴ of the proposed amendment provides that all judges and justices shall be selected by the governor from nominees approved by a judicial nominating commission. There would be a separate judicial nominating commission for the supreme court, for each division of the court of appeals, and for each district of the superior court and district court. Each commission would consist of three lawyers, two members of the judiciary, and four lay citizens.⁵ All commission members would be

3. For a discussion of the entire proposed amendment, *see* Professor Rieke's article at pages 811-838 of this volume.

4. Section 9 of the proposed amendment provides:

Section 9. SELECTION AND TERMS OF JUSTICES AND JUDGES.

(1) **Nomination and Appointment.** Appointment to the vacancies and positions for justices and judges shall be made by the governor from nominees approved by a judicial nominating commission. If a vacancy remains unfilled for six months, the chief justice may make an appointment of a nominee approved by a nominating commission.

(2) **Initial Term.** The initial term for each justice or judge, appointed to a vacancy or a position, shall be for four years after appointment and until the second Monday of January following a judicial election held after the expiration of the initial four-year term.

(3) **Retention Elections.** At the judicial election immediately preceding the expiration of each term, the justice or judge shall stand for retention. Any justice or judge who was elected to his office prior to the effective date of this article shall, at the expiration of the term for which he was elected, stand for retention. The question submitted to the voters at any such election shall be whether the justice or judge shall be retained for an additional six-year term. The position of any incumbent who fails to receive a majority vote for retention shall be deemed vacant as of the second Monday of January following the election.

5. Section 18 of the proposed amendment provides:

Section 18. JUDICIAL NOMINATING COMMISSIONS.

(1) **Number.** There shall be judicial nominating commissions. Unless combined by statute or by rule authorized by statute to serve more than one court or more than one geographic area, there shall be one commission for the supreme court, one for each division of the court of appeals, one for each district of the superior court, and one for each district of the district court.

(2) **Membership and Selection.** Judicial nominating commissions shall consist of two designees of the chief justice of the supreme court selected from the judiciary in the geographic area served by the commission, three lawyers, and four lay citizens who shall be selected to be broadly representative of the public interest. The time and method of selecting the members shall be prescribed by statute.

(3) **Terms and Compensation.** The terms of office and any reimbursement or compensation for members of the judicial nominating commissions shall be fixed by statute.

(4) **Limitations.** No member of a judicial nominating commission shall hold any other public office for profit or office in a political party or organization. Judicial members may continue to hold the state judicial office then held. No members shall be eligible for appointment to any state judicial position not then held, so long as he

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precluded from holding any other public office for profit and from serving as an officer in a political organization.

Since the adoption of Washington's constitution, judges at all levels in the state have had to run for office in a popular election on a non-partisan platform. The present term of office is six years for the supreme and appellate courts and four years for the superior, justice and municipal courts.⁶ Both the nine-member supreme court and the twelve-member court of appeals have one third of their members running in each general election held in even-numbered years. Judicial candidates first appear on the ballot in the primary election. If there are only two candidates or if one candidate receives over fifty percent of the vote, the winner of the primary election appears unopposed on the general election ballot. If there are more than two candidates and no candidate receives over fifty percent of the vote, the two highest candidates proceed to the general election ballot.

Under the proposed amendment, the initial term for each appointee to the bench would be four years, after which time a "retention election" would be held in which the electorate would simply vote on whether the judge should be retained for an additional six years. Subsequent "elections" would be held every six years. The governor, with the approval of a judicial nominating commission, would appoint replacements for all judges who fail to receive a majority vote for retention.

Two aspects of the Citizens' Committee's proposal for selecting judges suggest that it is worthy of serious consideration. First, while the proposed selection process is not a radical departure from the practical operation of the present system, it would insure greater citizen input. Second, since the proposed selection method would not require judges to conduct periodic election campaigns, it would alleviate many of the inherent problems the present election process creates for lawyers, judges, and the public.

is a member of a judicial nominating commission, nor for a period of one year after the expiration of the term for which he was appointed to the commission.

(5) Duties. The primary duty of the judicial nominating commissions shall be to make investigations and determine the qualifications of the available candidates to fill judicial vacancies or positions. When a vacancy occurs in any judicial office, the commission shall submit lists of qualified candidates for judicial office to the governor as required by statute. Additional duties may be created by statute.

6. See WASH. CONST. art. 4, §§ 3, 5 and 30; WASH. REV. CODE §§ 2.06.070 (Supp. 1972), 3.04.080 (1959) and 3.14.020 (1959).

That the Citizens' Committee's proposed selection method is not a radical departure from the practical operation of the present system is evidenced by the fact that most judges presently serving in the state initially were appointed to the bench. Indeed, seventy-five percent of the judges serving on the superior court, ninety-two percent of the judges serving on the court of appeals, and sixty-six percent of the supreme court justices were appointed to office by the governor whose executive action is required by the fact that most judicial vacancies arise between elections. In addition, while there is no constitutional provision obligating the governor to consult with the bar association prior to making judicial appointments, the bar association traditionally has been asked to submit recommendations to the governor's office and with few exceptions appointments have been made from these lists. The Board of Governors of the State Bar Association submits the recommendations which it receives from its judicial selector committee for vacancies occurring on the supreme court and court of appeals. Similarly, the county bar associations submit lists of recommended candidates to the governor's office for superior court vacancies and, in a few instances, submit lists of recommended candidates to the appointing county or municipal bodies that fill vacancies in the district and municipal courts.

Under the Citizens' Committee's proposal, judges still would be appointed, but unlike the operation of the present system, lay citizens would be represented on the bodies charged with the responsibility of submitting approved candidates to the governor. Further, although the citizenry would not be given the periodic opportunity of choosing between two candidates under the proposed plan, it nevertheless would still have the opportunity periodically to reject a judge appointed by the governor and approved by the appropriate judicial nominating commission.

The present system of selecting judges by election creates many problems for members of the bar which will be eliminated if the proposed selection method is adopted. Since the present selection method pits two lawyers seeking judicial office against one another in an election campaign, it is only natural that candidates call upon their colleagues of the bar for support. Traditionally, lawyers have responded to such calls for support by joining sponsoring committees, publicly endorsing the candidate, sending endorsement cards to friends, erecting yard signs and engaging in other activities designed to iden-

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tify the candidate with the lawyer and to promote name familiarity for the candidate.

However, requests for such support can create serious problems for lawyers. First, financial pressures caused by campaign contribution requests can be serious. Since candidates for judicial position look to the bar for their financial support, lawyers may find themselves in an untenable financial position when there are multiple judicial races with worthy candidates in each of them deserving support. Second, a lawyer who opposes an incumbent or supports a candidate who might not be successful may be taking a risk. It would be naive to suggest that lawyers are insensitive to the possibility that ill will may be created by publicly supporting a candidate who unsuccessfully challenges an incumbent.

The reaction of a victor in a campaign varies—some judges are gracious to all who appear before them in court, while others are highly critical of lawyers who have actively supported an opponent. In any event, the lawyer who supported the victor's opponent, and perhaps to a greater extent that lawyer's client, often will wonder whether his case would have been treated more favorably by the court if the lawyer had supported the judge who heard the case. Of course, the magnitude of the risk will bear an inverse relationship to the size of the county in which the lawyer practices.

The dilemma facing a lawyer who must choose between candidates for judicial positions is heightened by the great discretionary powers given judges. Although most judges exercise discretion impartially, superior court judges occasionally have the opportunity to reward their supporters financially if they so choose. For example, the appointment of appraisers for estates or receivers for insolvent corporations can provide a lucrative reward for those who aided the victorious judge. While some counties in the state have taken steps to insure that these selections are made on the basis of merit, others have not. The mere appearance of a judge's ability to reward his supporters financially and discriminate against those who did not support him creates a situation which can only reduce public confidence in the judiciary.

The present process of electing judges creates another problem for the bar, deterring many of its most capable members from seeking judicial office. To be sure, the disparity in income between a judicial position and a successful law practice alone sufficiently discourages

many lawyers in this state. Nevertheless, many extremely able lawyers might be willing to make this financial sacrifice if they did not have to wage a costly and superficial campaign in order to secure a judicial office. A lawyer willing to spend large sums of money can succeed in establishing the degree of name familiarity needed to win an election. Similarly, an incumbent with wide community name familiarity who has not earned the support of his fellow lawyers nevertheless may be invulnerable because the more capable members of the bar are financially unable to generate the publicity needed to unseat the incumbent. The publication of the results of polls of the bar as to the merits of judicial candidates generally has not been a determinative factor in judicial elections in this state.

Viewed from the bench, the present election system presents an equivalent number of problems. Facing an election, the judge realizes that he probably will be elected or fail to be elected on the irrelevant issue of name familiarity. On occasion, candidates seeking election actually have promised to take specific attitudes in particular cases, apparently not realizing that such promises could cause their disqualification from those cases. The temptation is great to espouse a politically advantageous judicial philosophy, such as a hard line on criminal sentencing. The failure of the public as a whole to realize that a judge cannot commit himself to a course of action prior to hearing a particular case compounds the temptations, placing contenders and incumbents alike in an extremely difficult position.

The nonpartisan nature of judicial campaigns in this state effectively shields the candidates from open partisan politics. While this is commendable, it also causes partisan party organizations to be unavailable to candidates, compelling candidates for judicial positions to develop their own campaign organizations, which is a difficult, expensive and time-consuming task in a large county and a staggering effort on a state-wide basis.

Vastly increased campaign costs present a serious obstacle to judicial candidates. In 1964 the average cost of election for a superior court judge in the largest metropolitan county in Washington state was approximately \$15,000. This provided for minimum newspaper coverage with no radio or television exposure. By 1968 the cost of a similar campaign had increased to between \$25,000 and \$40,000 in some judicial campaigns. In 1972, some candidates spoke of spending as much as \$50,000 to win a judicial campaign in that same metro-

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politan area. In addition, the cost of minimum state-wide media coverage and other incidental campaign costs in two 1970 supreme court campaigns totalled approximately \$35,000. In recent Washington Supreme Court races, the burden of financing the campaign forced some judges to devote most of the proceeds from the sale of their homes to pay campaign costs.

While the financial cost of the election process is the most apparent loss to the judge, the time spent on campaigning imposes an even greater burden on the operation of the judicial system. The nature of appellate work is such that a judge spends roughly one quarter of his time on the bench and the balance of his time on work not regulated by a precise schedule. To be effective, an appellate court judge must be able to spend a significant amount of time preparing for hearings, writing, maintaining contact with problems of the public and researching a variety of legal problems. Since the work of the supreme court by its nature does not take a judge to the most populous areas of the state, a judge is forced to publicize himself by spending time critically needed on the job campaigning and speaking on issues unrelated to his work. This intrusion into the productive time of an appellate court judge is a serious drawback inherent in the present elective process. Although it is impossible to project a firm figure, my own experience leads me to believe that appellate courts could be approximately one-third more productive if the judges did not face the prospect of periodic political campaigns. There is a similar loss of productivity at other court levels.

The bench and the bar are not the only victims of the present elective process; the public also loses when an unfit candidate is selected for a judicial office on the basis of an irrelevant issue such as name familiarity. This state has an excellent judiciary staffed by judges who compare favorably with the best in the nation. This condition is due largely to the willingness of members of the bar to make sacrifices. Occasionally, however, inadequate judges are selected under the elective system, and it is often difficult if not impossible to remove these judges since name familiarity supplies a degree of protection that challengers often are unable to overcome. The public cannot afford to have judges who are not the most capable the legal profession can produce.

Finally, an equally serious threat posed by the elective system is its assault on the integrity of the entire judicial system. Courts must serve

the interests of all the people, and any selection process which encourages selection of judges who by temperament or inclination have no time or desire to become aware of crucial issues affecting people of all economic and racial backgrounds must be rejected. Lawsuits must, however, be won in court on the merits of the particular case, leaving no room for the subtle and not-so-subtle political pressures inherent in an elective judiciary system. In the face of such pressure, our country's rule by law rather than men could become the ultimate victim, seriously threatening the concept that "in our courts all men are created equal."

Fear has been expressed that if a "retention election" is introduced it will mean, in effect, lifetime appointments for judges, without an effective means for their removal by the voters. Experience with the "retention election" system in other states indicates this is not necessarily the case.

Three Colorado judges who stood for retention were not returned to office in the last election.⁷ In 1968 three Colorado county judges were defeated, and a juvenile court judge was defeated in 1970.⁸ In Nebraska the bar association and a citizens' group in 1972 combined to campaign to defeat a juvenile court judge by an 85,281 to 56,562 margin.⁹

As stated in a special report of the American Judicature Society, "Merit retention has established itself as a judicial tenure device which gives substantial assurance of security in office while still preserving for the voter an effective voice in the process."¹⁰

In summary, the process of selecting the judiciary by election creates difficult problems for lawyers, judges, and, ultimately, the public. To insure that only the most capable members of the legal profession sit on the bench and that they be able to work efficiently and dispense justice impartially, I believe the present selection process should be abandoned and the selection process proposed by the Citizens' Committee on Washington Courts be adopted.

7. American Judicature Soc'y, *Special Society Report: Merit Retention Elections in 1972*, 56 JUDICATURE 252, 253 (January 1973).

8. *Id.*

9. *Id.*

10. *Id.* at 254.