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# Erosion of Democracy

TYRIE A. BOYER\*

I am always perplexed by those who claim to support democratic government while simultaneously doubting the ability of the electorate to select judges. Such an attitude is not unlike professing to be a Christian while doubting the divinity of Jesus Christ, or claiming allegiance to Judaism while doubting the authority of the Ten Commandments.

In my view it is inconsistent to give the people the power to elect a President who has the authority to send our sons and daughters to their death in foreign lands, and to elect a Congress with authority to affect our daily lives by the passage of laws, both popular and unpopular, and to possibly destroy our businesses and futures as a result of the impact of taxes, while denying that those same voters are competent to select judges to administer and interpret those same laws and actions.

Justice Overton, of the Supreme Court of Florida, in his many speeches on the subject, supports so-called merit selection and retention of judges on the basis that, until the Jacksonian Era, judges were appointed rather than elected. He somehow extrapolates from that position that we should return to the custom of our Founding Fathers by abandoning judicial elections. Applying the same logic, most of our present electorate would be disenfranchised. As we all know, prior to the Jacksonian Era, and long thereafter, women, African-Americans, and citizens who did not own property were not permitted to vote. Further, the qualified property holders were required to pay poll taxes for the privilege of voting. Does Justice Overton, one asks rhetorically, recommend that we also reinstate those practices of our Founding Fathers? Of course not.

Over the last forty years, I have occasionally debated the subject of an elected judiciary versus an appointed one, ever since the emergence of what then was referred to as the "Missouri Plan." The arguments in favor of appointing judges have traditionally been: (1) that the selection of judges should be removed from politics; (2) that it is undignified and humiliating (and too much hard work) to seek a judicial position via the elective process; and (3) that the citizens lack sufficient information and knowledge (meaning competence and intelligence) to select judges.

I will address those arguments in reverse order. First, I do not

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agree that the citizenry is too incompetent or uninformed to select judges. While mistakes will occasionally be made in selecting judges, mistakes are also made when electing executives and legislators. Furthermore, the citizens have a right to be wrong. Unelected nominating commissions (who have their own agenda) do not. There is simply no basis for the proposition that voters are any less able to evaluate judicial candidates than they are capable of evaluating executive or legislative candidates. Although the issues may be different, the process is the same. In choosing legislators and executives, each voter rightfully looks at the candidate's past record and attempts to select the candidate whose views most closely coincide with his own. In selecting judges, the same criteria apply. The voter looks at the candidate's record for honesty and integrity, competence and ability, intelligence and industriousness, and most importantly, fairness and judicial temperament.<sup>1</sup> Voters are just as capable of ferreting out those attributes in a judicial candidate as they are the attributes and convictions of legislative and executive candidates.

Many argue that it is improper for a judicial candidate seeking election to take a stand on issues which may come before him or her as a judge. I agree with that argument; as I have demonstrated, taking such a stand on substantive issues is not necessary in judicial elections. Indeed, one of my primary objections to the so-called "merit selection and retention" process is that the members of the Judicial Nominating Commissions are appointed by individuals who have political agendas. Those commissioners know, when they are appointed, what is expected of them. The voters have *no* voice in the matter whatsoever. The commissioners, who owe no allegiance to anyone other than their appointive authority, have agendas of their own. They meet, interview, and select the nominees "out of the sunshine." The commissioners look for nominees to support *their* agenda. Because they are sophisticated in the process, the commissioners do not ask questions that directly interrogate the potential nominee regarding burning current issues, such as abortion and race relations. Their questions, however, are framed so that it is impossible for any intelligent person not to know the implications of those questions and, of course, to seek to respond accordingly. If such questions are to be asked, is it not more appropriate to have them posed to a judicial candidate in the presence of those who will be judged, the public, rather than in a closed room in the presence only of a small committee with a private agenda holding in their hands the future of the individual seeking nomination?

I have, personally, on more than one occasion, sought judicial posi-

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1. Judicial temperament means the ability to hear all sides of an issue, and politely, but firmly, make a decision free of prejudice or bias.

tions by way of both the elective process and the selection process. I can state, without equivocation, that there is more "politics" (in its most derisive sense) involved in the selection process than in the election process.

In an election, the candidate seeking office selects a campaign treasurer to coordinate the raising and disbursing of the funds necessary for any campaign. The candidate then exposes herself or himself to the scrutiny of the general public for observation and interrogation, usually along with the other candidates. Thus, the electorate has an opportunity to both evaluate the qualifications of the candidate and to compare that candidate with the other candidates.

On the other hand, one seeking a judicial office by way of "merit selection" must first prepare and submit a long and complicated application, self-servedly anticipating those qualifications which are preferred by the members of the unelected nominating commission. Next, the candidate seeks out friends and relatives of the various commissioners and convinces them to contact the commissioners on his or her behalf. The commissioners then apply their own criteria and agenda during the elimination process. The commissioners' criteria and agenda may well be entirely different from that of the population in general and may or may not be based upon the qualities desirable in a good judge. The few lucky survivors are then "interviewed" (interrogated) by the commission members, each of whom will be seeking candidates who fulfill his or her own personal expectations and who will be acceptable to the Governor. Finally, three names, none of which have been democratically selected, will be submitted to the Governor as "qualified." The Governor, restricted to those three nominees, then makes his appointment.

The merit selection system contains the potential for abuse. If the members of the Nominating Commission (who unlike the Governor are not elected) desire the appointment of a particular candidate, they need only submit that candidate's name along with two obviously unqualified candidates or two who are known not to meet the Governor's expectations. In this way, the Commission can cram a single nominee down the Governor's throat. Of course, the opposite can (and does) also occur. The Governor simply lets it be known who he or she desires to appoint, whereupon the Commission ensures that that person's name is among the nominees. The Governor makes the appointment and the other two nominees, regardless of their qualifications, "go hence without day." The Governor is insulated in the event that the appointee turns out to be a less than ideal judge. The Governor is insulated because the nominee *was* submitted by the Nominating Commission. The proof of the pudding is that one may often learn who will replace a particular judge by

visiting the lawyers' lounge in the courthouse, even before that judge submits his or her resignation.

There is another important consideration. Americans have traditionally understood that few people are perfect; therefore, they are willing to forgive small transgressions. In the elective process, a candidate who has been active in public affairs or elsewhere, but who may have along the way stubbed his or her toe, has the opportunity to explain any past transgressions, and it is left to the voters to compare him or her with other candidates. By contrast, in the "merit selection" process, the commissioners must insist that every candidate be "squeaky clean" in order to avoid any embarrassment to themselves or to the Governor. Furthermore, a situation or event which the commissioners may consider disqualifying may well be viewed as an attribute by the voters. The voters, however, have no say in the matter. Through merit selection, those who have been active during their lives have little chance of being nominated by a Nominating Commission, because certainly the best way to avoid making any mistakes is to never do anything. Thus, nominees tend to be either members of large law firms who have devoted their lives to corporate practice, having little contact with either the people or the type of law which come before real life judges, or professional Assistant State Attorneys who, in most instances, know little or nothing about civil law or the "rough and tumble" of surviving in a private general law practice.

It is virtually indisputable that Justices Brandeis, Holmes, and Thurgood Marshall, because of their real-life activities, would never have survived Florida's "merit selection and tenure" process. Though it has been argued that those great Justices would also have failed in the elective process, there is a great difference. In the elective process, the candidate has an opportunity to publicly respond to innuendos and accusations. Further, the electorate has an opportunity to compare the candidate with other candidates. In the merit selection process, although, theoretically, the electorate can remove a sitting judge, the public has no way of knowing who will replace the judge nor whether that successor will be an improvement.

Notwithstanding the current fever to appoint, rather than elect all judges in Florida, my experiences around the United States have convinced me that, as a whole, Florida is blessed with the best judges in the nation. Of course, the Florida judiciary has its share of despots and incompetents. And while some judges are not intellectually honest, I am aware of none who is consciously dishonest. Our excellent judiciary, as a whole, may well be attributable to the fact that our trial judges are elected. Because there is a general tendency for appellate judges to be selected from the trial bench, the result is that, although appellate judges

are appointed, in many instances those judges have been initially selected by the elective process which is indelibly, though perhaps unconsciously, imprinted in their memories.

I have a simple response to those who claim that the elective process is too demeaning, time-consuming, and expensive. Anyone who feels that it is beneath his or her dignity to shake a hand and request a vote is apt to exhibit the same feelings of superiority while presiding in the courtroom, and such a person may become arrogant and abusive. Though happily few in number, such judges do, in fact, exist in Florida today. It is also disturbing that critics complain that campaigning takes too much time. The position of judge requires more than forty hours per week, and judges are not compensated for overtime. If an individual feels that campaigning is too time-consuming and fatiguing, then perhaps he or she will feel the same way about investing the time necessary for the performance of judicial duties.

Judges *should* possess the qualities of humility and equality. Nothing instills those virtues as well as meeting the day shift of factory workers at 6:00 a.m. as their shift commences and the graveyard goes off duty. A candidate, while shaking hands, looking the voters in the eye, and asking for their vote, learns (often for the very first time) what life is really about. There is no such "levelling process" in the so-called merit selection system.

Although emphasis is most often placed upon the selection process, the process of retention is equally important. The elective process furnishes a method for removing, via competitive elections, despotic, lazy, incompetent, or dishonest judges. This is especially important to litigants and lawyers, those most concerned. While we do have a Judicial Qualification Commission, its record, particularly with reference to despots on the bench, has not been impressive. The merit retention process has been equally ineffective. First, it has been extremely difficult to reach the public on the issue of retaining a particular judge. Second, it has been almost impossible to articulate why a particular judge should not be retained. The result is that judges are virtually never rejected, even if they have demonstrated complete unworthiness for their position.

The other side of the coin is that the system may be completely unfair to sitting judges. For example, recently in a sister state, a political situation resulted in a drive, to which the sitting judges had no way of responding. That drive resulted in the removal of virtually all the incumbent judges, notwithstanding that many of them were excellent judges and had done no wrong. Those sitting judges were, in effect, forced to run against ghosts. An election process would have permitted each judge to face his accuser (or opponent) in an open, robust, and

hearty debate, giving the interested parties (lawyers, litigants, and potential litigants—all of whom are voters) an opportunity to compare the incumbent with his accuser. What could be more democratic and American?

Another major flaw in the so-called merit selection and retention process is the lack of accountability. Every individual in government should be accountable to someone. Such is particularly true with regard to the judiciary, which is arguably the most powerful of the three branches of government. Legislators can pass laws, executives can attempt to enforce laws, and the people, by referendum may even amend the Constitution. However, the judiciary has the power to declare any legislative or executive act unconstitutional and is the ultimate authority in construing the Constitution. We are all acquainted with judicial interpretations and engraftments. For example, the word "must" becomes "may," the word "shall" becomes "maybe," and the First Amendment to the United States Constitution becomes a mandate for the separation of church and state, though I challenge anyone to point to one word in the Constitution to that effect. The point is that, in a democracy, officers having such power should be accountable. However, only through the elective process, whereby judges become accountable to the people, is there any accountability. Nominating Commissions are appointive, and accountable to no one. Certainly nominees are not accountable to the Nominating Commissions. Because the Governor, theoretically, has no input in the selection process, the ultimate nominee has no responsibility to the Governor, and the Governor is therefore not accountable to the people for the nominee's future performance.

To summarize, those advocating the elimination of the democratic elective process in favor of the so-called merit selection and retention system can engage in a parade of horrors to prove their point. With mature thought and experience, however, a countervailing parade of horrors can be demonstrated to exist in the present merit selection process.

My strongest argument is simply that I have faith in the American people, who, despite occasional errors, have demonstrated their ability to govern themselves.

I have addressed the issue of whether the elective process or the appointive process is the superior method for selecting judges. Those defending the appointive process often argue that while the system may not be perfect, it is subject to improvement. I immediately embrace that argument. Clearly, if Florida is going to continue to use or expand its merit selection and retention system, then there are many changes and improvements which can and should be made. That, however, is beyond

the scope of this presentation. Nevertheless, rather than experimenting with an appointive system, I would recommend embracing the superior method of judicial selection, elections.