Judicial Selection in Washington—Taking Elections Seriously

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I. INTRODUCTION

The following remarks suggest that the election system for choosing Washington judges is not, in any significant degree, an election system at all. Most Washington judges do not get on the bench by election and elections are rarely used to evaluate sitting judges. Through the quiet adoption of certain practices and customs, citizen voice through elections rarely plays a role. If elections are a good way to select and retain judges—an issue not debated here[1]—important changes in our practices are essential if we are to take elections seriously.

II. TWO REASONS WHY JUDICIAL SELECTION IS SO IMPORTANT

A. The Judge and the Rule of Law

It is universally understood that we live in a society governed by the Rule of Law. Even in its narrow, procedural sense, this complex idea has several layers. First, it means that government power should be exercised according to generally accepted norms rather than reflecting the preferences of acting officials. The principle also requires that the norms themselves be public, clear, stable, and predictable. Further, the concept requires that the norms be applied evenly and without discrimination. And still further, the notion requires that persons specially affected by the application of norms be given an appropriate opportunity through

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1. The literature on judicial selection is voluminous. A good starting place for developing some familiarity is the *Symposium on Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges*, 34 FORDHAM URB. L.J. 1 (2007). The symposium, which is over five hundred pages in length, reviews much of the relevant literature. And the literature continues to grow. *See, e.g.*, CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (Routledge, 2009); RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS (Streb Ed., 2007).

argument and possibly proof to express their view as to the norms applied in their case. Finally, the concept suggests that any norm is given meaning only as part of a general system of norms, with which it must cohere to some degree; the law is more than a compilation of unrelated rules.

Many people play roles in maintaining the Rule of Law: public officials (legislators, executives, prosecutors), legal professionals (advocates, advisors, counselors), and private citizens (jurors, parties, witnesses, critics). In the United States, the persons most immediately responsible for the Rule of Law on a day-to-day, case-by-case basis are judges. Everything listed in the preceding paragraph is involved in every case brought before a judge, and the ability of our judges—day by day—to meet these difficult and sometimes conflicting goals is the degree to which we truly live under the Rule of Law.

Judges are not, for this reason, better or more important than other public officials. But they are different, and have in their care a special and critical part of our community values. Whatever method we use to select judges must be sensitive to these values.

B. The Judge and the Individual Citizen

The second reason judicial selection is so important is that the judicial function is so dramatically focused on specific individuals. Unlike judges, legislators operate as a group and develop general policies that do not immediately impact individuals. An unskilled or inattentive legislator cannot alone cause much harm to individuals; he or she must persuade a majority of the legislature to adopt a measure and even then, the measure is general, has no direct impact on individuals until other officials (investigators, enforcers, prosecutors, agencies, judges, juries, etc.) have agreed. Judges, by contrast, usually work alone and their decisions can immediately impact the parties before them. A judge can issue orders to take away a specific person's home, his business, his child, even his liberty. Lack of skill in this setting can have tragic and often irremediable consequences. It is useful to regard judges in the same way we think of others whose lack of skill or experience can cause immediate harm to specific individuals—think of brain surgeons or airline pilots.

III. IS THERE A PROBLEM WITH THE QUALITY OF OUR JUDGES?

The public no doubt believes that the quality of our judges is generally high. It is. But as professionals, we cannot ignore the fact that quality lapses among our judges are real, even if not commonplace. Given the nature of judging as described above, the consequences of lack of skill can be very harmful to the individuals affected. A recent compila-

tion of problems with sitting judges—drawn from court decisions, state disciplinary committees, newspapers, and scholarly literature—contains this taxonomy:

> Most examples of bad judging can be grouped into the following categories: (1) corrupt influence on judicial action; (2) questionable fiduciary appointments; (3) abuse of office for personal gain; (4) incompetence and neglect of duties; (5) overstepping of authority; (6) interpersonal abuse; (7) bias, prejudice, and insensitivity; (8) personal misconduct reflecting adversely on fitness for office; (9) conflict of interest; (10) inappropriate behavior in a judicial capacity; (11) lack of candor; and (12) electioneering and purchase of office.[2]

Miller gives examples of and citations for all categories. Even if the average quality is high, we would never accept airline pilots or brain surgeons on such a basis—the risk to individuals from the occasional shortfall is simply too great. Unremitting attention to quality assurance is a primary duty of all professions, and the legal profession is surely not exempt from that obligation.

IV. SELECTION BY ELECTION OR APPOINTMENT?

How can a judicial selection system meet that obligation? The effectiveness of a judicial selection process can be measured by how well it meets the following two goals: (1) it must produce professionals with a high level of skill, to include both doctrinal knowledge and analytical ability, but also an appropriate sensitivity and commitment to Rule of Law considerations. We can call this the goal of assuring *professional proficiency*; and, (2) it must select judges who are not in the service of any particular political view. We can label this the goal of assuring *political neutrality*.

In the United States, these goals have been sought in two general ways—one involving popular election of judges and the other relying instead on some form of appointment.

The federal system uses the latter approach. The system the Framers adopted seeks to meet the first goal (professional proficiency) by providing that candidates be nominated by an accountable official—the President.[3] It seeks the second goal (political neutrality) by requiring confirmation by a governmental body wholly independent of the President—the U.S. Senate. This arrangement has served us well; our federal bench is regarded as the best in the land.

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2. Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432–33 (2004).

3. In U.S. presidential elections, many voters pay attention to the quality of judicial appointments, especially Supreme Court appointments.

The Washington Constitution, by contrast, follows the election approach. Drafted in the heyday of populist political philosophy, the Washington Constitution provides for the election of many officials including the commissioners of public lands, the secretary of state, the state treasurer, the superintendents of public instruction, the attorney general, and the insurance commissioner, amongst others. It is not surprising that drafters of our constitution should have provided for elected judges.

This means election of judges has a constitutional warrant in Washington. This historical circumstance probably explains the failure over the past seventy years of numerous proposals to replace the election system with another mode of selection.[4] The constitutional basis of our election system suggests that if our selection system has developed serious problems—and it has, as will be seen below—it would be the better part of wisdom to address these problems within the general framework of the current system. Rather than replacing our election system, we need to fix it.

V. THE SERIOUS PROBLEMS IN WASHINGTON'S JUDICIAL SELECTION SYSTEM

I define a serious problem as something that frustrates the basic idea the framers had: that ultimately the people must be in charge of deciding who should be on the bench. By that criterion, there are several problems with our current judicial selection system. The problems have resulted in part from broad social changes such as technological development (especially in the media), newly divisive policy issues, and an extraordinary increase in the amount of money invested in judicial elections. Causes that lie closer to home and which are within our control are the practices that have grown up in the way we manage our election system. As will be detailed below, these practices compromise our two goals of professional proficiency and political neutrality. The question to us is this: Can we repair the existing election system to address these problems?

The short answer is that some of these problems can be fixed within the framework of our existing election system and some cannot. For example, little can be done directly to limit big money media campaigns short of full public financing of judicial election campaigns. Current U.S.

4. Reform proposals have existed since the 1930s. The Walsh Commission released the most recent of these proposals in 1996. *See* WALSH COMM'N, THE PEOPLE SHALL JUDGE (1996), http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&theFile=content/walshCommissionFinalReport#I5.

Supreme Court rulings prevent direct limits on what people are allowed to spend in support of candidates of their choice.[5]

Nor, if we retain elections, is it possible to address judicial concerns about electioneering—those activities thought by some inappropriate for judicial officers, such as raising money, seeking endorsements, answering questions about issues likely to come before the court, etc. For all the harm these features present—and for all the excellent potential candidates for judicial office these activities may dissuade—they seem an inherent part of elections. As with big media campaigns, if we are to retain our election system, judicial candidates and sitting judges are just going to have to live with the obligations of electioneering.

But there are some problems we can fix without abandoning the election system and it is to those matters that the following remarks are addressed. To begin with, there is the problem of large campaign contributions that imperil impartiality in individual cases (the subject of the Court's recent *Caperton* decision).[6] This is a problem we can deal with to some degree by revising our rules for recusal, and serious work is going on in professional bodies to make necessary revisions.

Looking at the election process itself, there are problems at both the initial selection level and at the level of evaluating sitting judges that can be addressed while retaining—indeed expanding—our election system.

A. Initial Selection

Who makes the initial selection of judges? If the selection is made in an election (as when a candidate files against a sitting judge, or for an open seat) the initial selection is made by the voters. If a seat becomes open between elections, initial selection is made by the governor.

As it has turned out, initial selection is seldom made by voters. A convention has developed whereby retiring incumbents vacate mid-term, leaving the office to be filled by gubernatorial appointment. While the appointed judge must face the voters at the next general election, for reasons explained below there is seldom a challenge to an incumbent judge and, even if there is, the well-documented advantages of incumbency are at work. As a result, most Washington judges initially arrive on the bench by appointment rather than by election, and once there, tend to remain. How does this process furnish our two goals of professional proficiency and political neutrality?

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5. The starting point is *Buckley v. Valeo*, 424 U.S. 1 (1976). In January, 2010, the Court decided *Citizens United v. Fed. Election Comm'n*, No.08-205, 2010 WL 183856 (U.S. Jan. 21, 2010), which further limits Congress's ability to impose restrictions on campaign spending.

6. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).

1. Evaluating Professional Proficiency in Initial Selection

In initial selection by the governor, there is usually no judicial track record on which to base a firm judgment about the candidate. In that setting, objective criteria would seem important. And to apply criteria consistently, some process for gathering information about the candidates is essential. Also, if we are to honor the Framers' intent that the people ultimately control outcomes, transparency and public input would also be useful features.

But the current system does not guarantee any of these features. While some governors have devoted more time to judicial qualifications than others, at present there is no set of agreed-upon criteria, and no guarantee that information collection will be objective, comprehensive and consistent. Worse, the process is effectively closed to public participation and view; only insiders can play. Citizens simply have to have faith that quality really matters in the gubernatorial decision-making process.

In the infrequent case where initial selection is made by the voters, quality control is even worse. Without a judicial track record, without agreed criteria, and without relevant information, candidates compete in what can only be called a "beauty contest." Voters are left to choose on the basis of appearance, name familiarity, endorsements, rumor, and gossip—none of which can have much to do with professional proficiency. The limited value of the voter's pamphlet is discussed below. With other persons whose lack of skill may harm individuals—think again of brain surgeons, airline pilots—we would never think of choosing them on the basis of name familiarity, appearance, or political endorsements. But voters are asked to do essentially this in the initial selection of judges.

2. Obtaining Political Neutrality in Initial Selection

How does the current system fare in terms of procuring political neutrality? Not well. In the usual case of gubernatorial selection, there is simply no control on the degree to which a governor can use the judicial selection process as part of meeting his or her other political needs. Whatever claims of neutrality a governor makes, the citizens just have to take it on faith that political considerations are not given significant weight in the selection. As the framers of our federal Constitution wisely saw, some check on the political discretion of an appointing official is a very useful precaution. But no such check exists in Washington State.

It seems safe to say that for the initial selection of judges, the system as it works today is not very effective. Whatever may have been true in earlier times—where smaller communities might have made it possible that most judicial candidates were known to voters—today's

setting is sharply different. Our initial selection system is not effective in guaranteeing either the high quality or the politically independent judges the framers hoped we would have.

B. Retention of Sitting Judges

Problems in the evaluation of sitting judges flow from two sources. First is the surprising fact that most (perhaps 90%) of sitting judges never have to face the voters at all. The second is that even if there is a challenge, inadequate information is available to support informed voter choice.

1. Infrequent Challenges of Sitting Judges

If no one files against a sitting judge, that judge is automatically reelected. In King County, where more than fifty sitting judges were technically up for election at the last general election (2008), forty seven were unopposed and their names did not appear on either the primary or general election ballots. Only one incumbent was challenged[7] and she won handily in the primary.[8]

The fact that sitting judges do not often draw opposition has little to do with their performance. The lack of opposition stems from other factors, practices, and attitudes. To begin with, the powerful advantage of incumbency makes a challenge unlikely to succeed absent some extreme circumstance. The yard sign, "Vote for Judge Smith," seems to be compelling, especially in the absence of other relevant information about the candidates. The need to engage in electioneering activities, discussed above, deters other potential judicial candidates. Further, though such matters are not discussed openly, the mores of the profession characterize the challenge of a sitting judge with some disfavor. And some potential challengers can be discouraged by the fact that an unsuccessful challenge may strain relations with judges before whom the challenger's future cases must be tried.

If we took elections seriously, the right of citizens to vote on judges should not be limited to the occasional case in which someone can be found to challenge an incumbent. The public should be allowed to evaluate the performance of *all* sitting judges at the end of *each* term.

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7. That incumbent judge was Laura Middaugh. *See* VotingforJudges.org, King County Superior Court, http://www.votingforjudges.org/08pri/div1/king/index.html (last visited Feb. 8, 2010).

8. Washington Secretary of State, August 19, 2008 Primary Election Results, http://vote.wa.gov/Elections/WEI/Results.aspx?ElectionID=26&JurisdictionTypeID=9&ViewMode=Results (last visited Feb. 8, 2010).

2. Poor Information About Challengers and Incumbents

Sitting judges should be the subject of full objective performance evaluations at the end of every term and voters should be asked whether, on the strength of those evaluations, the judge should be retained. Impressive systems for objective judicial performance evaluation are now being used around the country and some have been tried in the state.[9] The systems need to be expanded to all counties and made mandatory.

The voter's pamphlet is no substitute for serious performance evaluations. The voter's pamphlet makes no attempt at a systematic examination of the candidate's qualities compared to a challenger. The document is composed of the candidates' own statements and a list of endorsers. If one asks voters what general traits an ideal judge should have, they list such things as life experience, the capacity to understand and apply legal knowledge, impartiality, communication skills, respect for parties, witnesses and jurors, organizational skills, efficient work habits, and the like. The voter's pamphlet contains little if any objective information about such qualities.

VI. THE PATH TO REFORM

It is not hard to identify what it would take to put our election system back on the track the framers designed.

For *initial selection* of judges, we need some way of assuring that the selection—whether made by the governor or by the voters—would be made from a short list of highly qualified candidates, a list that would be compiled in such a way as to maximize professional proficiency and ensure political neutrality.

For *sitting judges*, we need to ensure that the vote takes place after publication of systematic performance evaluations, and that all judges face the voters at the end of each term.

Is it possible to improve our election system in these ways? The picture is mixed. The good news is that polling of the citizens in the state consistently shows support for this kind of reform.[10] And the solu-

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9. The National Center for State Courts provides information for the eighteen states, including Washington, that conduct judicial performance evaluations. *See* National Center for State Courts, Links to State Judicial Performance Evaluations, http://www.ncsconline.org/wc/CourTopics/statelinks.asp?id=46&topic=JudPer (last visited Feb. 8, 2010). Some of Washington's pilot projects are described in David C. Brody, *A Report on the Washington State Judicial-Performance Evaluation Pilot Project*, 56 WASH. ST. B. NEWS 30 (Sept.2002), *available at* http://www.wsba.org/media/publications/barnews/archives/2002/sep-02-report.htm.

10. In Washington's latest survey, over 60% of the respondents supported reform of the kind described here, while only 16% opposed it. DAVID C. BRODY AND NICHOLAS P. LOVRICH, PUBLIC ATTITUDES REGARDING THE SELECTION OF JUDGES IN THE STATE OF WASHINGTON: RESULTS OF A

tions needed are not novel or exotic. Mechanisms to meet these goals have been around for more than 100 years.

For initial selection, the traditional way of ensuring quality control of candidates has been the nominating commission, which, after study, submits a short list of names from which the governor makes appointments. Today, there are 365 judicial nominating commissions in thirty-three states that screen and recommend applicants for the bench. In total, over 3,000 commissioners serve in this capacity across the country, aided by at least 100 administrative staffers who coordinate the commissions' work. There is now a national clearinghouse through which these commissioners and their staffs share experiences and fine tune their systems. For evaluation of sitting judges, some twenty-five states have systems requiring all judges to face the voters at the end of every term.[11]

In short, the ideas discussed here are hardly new and experimental. There are many tested and successful models that could quickly be adapted to Washington's history, constitutional setting, and culture.

The not-quite-so-good news is that in Washington today there are voices in the legal community that seem opposed this kind of change. Consider four groups: lawyers, bar associations, judges and judge's associations. The most recent polls show that many Washington lawyers would support the kind of reforms suggested here.[12] The current Board of Governors of the state bar association, on the other hand, seems opposed.[13] It is not clear what the generality of judges thinks. If judges mirror the views of the generality of lawyers, one would suppose they would favor reform. Bust some members of our highest court have expressed opposition and the judges' official organization—the Board for Judicial Administration—has not announced its view.[14]

The grounds for opposition on the merits are not easy to understand. (I am assuming that protecting the tenure of incumbents or protecting a

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STATEWIDE SURVEY, at 3 (2008), http://www.kcba.org/judicial/pdf/SurveyReport.pdf. The Walsh Commission reported similar findings. *See* WALSH COMN'N, *supra* note 4.

11. For a summary and reference to details of these plans, see American Judicature Society, AJS Launches Judicial Nominating Commissioner Network, http://www.ajs.org/ajs/publications/Judicatories/2009/January/feature_jncnetwork.asp (last visited Feb. 8, 2010).

12. Indeed, a majority of those responding to a 2007 survey of four thousand Washington lawyers expressed that they are "dissatisfied with the current election process." WASH. STATE BAR ASS'N, BOARD OF GOVERNORS JUDICIAL SELECTION TASK FORCE MAJORITY REPORT 8 (2007), https://www.givebasic.com/justiceforwashington.org/downloads/judicialselectioncommitteemajorityreportrevised.pdf. Only 36.4 % of the respondents supported election of trial court judges. *Id.*

13. *Id.* at 2–3.

14. The Board was divided on the issue, and declined to take a formal position: "[T]he Board's position in support of election did not . . . represent formal opposition to either merit selection or retention elections. This position remains the Board's position . . . ." Letter from Jeffrey Hall, Executive Director, Board for Judicial Administration, to Richard Fitterer, Grant County District Court Judge, and Vickie Churchill, Island County Superior Court Judge (Dec.1, 2006) (on file with author).

comfortable position for insiders are not arguments on the merits.) Some of those resisting reform have argued that reforms of the kind suggested here will take away the citizen's right to vote. The argument has great rhetorical power—explaining, no doubt, its popularity with opponents of reform—but it wholly misses its target, since the reforms discussed here have the specific goal of dramatically increasing both the quantity and the quality of judicial elections. It would help if those making this argument sensed this contradiction; they are otherwise at risk of being thought uninformed or disingenuous.

Perhaps what this argument struggles to express is that reforms of the kind suggested here will have an effect on the pool of persons governors can appoint and voters are likely to retain. The governor would not be able initially to select, and the voters would be less likely to retain, candidates and sitting judges unable to make a plausible and objective case that they are among the best qualified. But that hardly seems like an argument *against* reform. True, we do not have such a filter for candidates for the legislature or the governor's office. But that is because governors and legislators are representatives and explicit policy makers: the principal issue in their election is the congruence of their policy views with voter preferences—a congruence that can be readily tested in an unmediated election. When legislative and executive candidates appear before the voters and explain their policy views, voters have access to the primary information they need to choose among candidates.

But voters in a judicial election are not so fortunate. Judges are neither primarily policy makers, nor are they representatives. Their job is to interpret and apply the law with technical accuracy, a duty of fairness to the people who appear before them, deep commitment to impartiality, and a keen sense of their obligation to reflect and further the Rule of Law values mentioned above. Information about the skills needed to succeed in these tasks is not so readily available to the voters. You would have the same information problem if you were electing brain surgeons or airline captains or deciding by election which drugs were safe and effective. There are simply better ways to assure citizens (and passengers and patients) the quality they deserve. Certainly, relative judicial skill levels have nothing to do with money-raising prowess, political endorsements or name familiarity, the usual determinants of many judicial election outcomes. If Washington is to use elections as part of judicial selection, at the very least a requirement of objective qualification as a condition of judicial candidacy seems essential.

The question then becomes, who will do the evaluating; who will decide which four or five names will be submitted to the governor for appointment, and who will conduct the performance evaluations of sit-

ting judges. Those are legitimate questions. Performance evaluations have been discussed earlier,[15] and, in the trials in Washington, evaluations so far seem helpful ways of getting useful and objective information about sitting judges from those who appear before them, including jurors, witnesses, lawyers, and parties.

As to initial selection, as indicated above, there are many working models around the country. The best of them involve a broad-based and intentionally diverse citizen's commission charged with evaluating judicial candidates. The evaluation will be according to stated criteria, will take place on the basis of full information about the candidates in a process that is transparent and open to citizen review. It is probably naïve to think politics can be wholly eliminated in any judicial selection system, but these kinds of procedures can sharply limit the play of politics in commission work. And we can say without fear of contradiction that any such commission system would be far less political than the gubernatorial appointment system through which most judges reach the bench today. As far as guarantees go, unlimited gubernatorial appointment is one hundred percent political, completely free of binding criteria, bereft of any obligation to compile comprehensive and objective information about candidates and, in the bargain, wholly closed to public view.

Some have suggested that today's gubernatorial appointment process is accountable, since we elect the governor, whereas a commission would be made up of unknown and unaccountable appointees. Digging beneath its smooth surface just a little, that argument seems unsupportable for two reasons. One, with an information-based, transparent process, a diverse commission cannot stray far from fidelity to its stated criteria. And two, the claim of gubernatorial accountability seems, in the real world, pure fancy. When was the last time the quality of an incumbent governor's judicial appointments was even mentioned in an election? Unlike the judicial appointments of the president, the governor's appointments are well below the voters' radar.

VII. CONCLUSION

It will take determined leadership to overcome the objections of those who find aid and comfort in the current system. Members of the legal profession should be in the forefront of reform as they have been in other states.[16] Legal professionals, more easily than most, can under-

15. *See supra* note 9 and accompanying text.

16. In the most recent example, members of the Minnesota Supreme Court testified in favor of reform of the sort discussed here. David Kaplan, *Bipartisan coalition seeks to reform Minnesota judicial elections*, TWIN CITIES DAILY PLANET, March 10, 2010, http://www.tcdailyplanet.net/ne

stand how the system has drifted so far from the framers' intent, can appreciate the fundamental values that are at stake, and can help devise practical measures to correct the problems. Taking elections seriously will require discerning lawyers and judges reflecting that spirit of community responsibility in which lies the true meaning of professionalism.

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ws/2010/03/08/bipartisan-coalation-seeks-reform-judical-elections-minnesota. And the American Bar Association has expressed concern over judicial selection in states which use unmediated elections. *See* Carol A. Lamm, *ABA President's Message: Let's Leave Politics Out of It*, ABA JOURNAL, March 2010, http://www.abajournal.com/magazine/article/lets_leave_politics_out_of_it/.