6-1-2001

What Makes Judicial Elections Unique

David B. Rottman

Roy A. Schotland

WHAT MAKES JUDICIAL ELECTIONS UNIQUE?†

David B. Rottman and Roy A. Schotland***

Edward Ryan, a delegate to the 1846 Wisconsin constitutional convention who later became a chief justice of the Wisconsin Supreme Court, saw the issue clearly. He stated that the judiciary "represents no man, no majority, no people. It represents the written law of the land . . . it holds the balance, and weighs the right between man and man, between the rich and the poor, between the weak and the powerful."[1]

Any consideration of judicial elections begins with one overriding fact: these elections are uniquely different from all other elections. But to appreciate the uniqueness of judicial elections, we must first note the differences between judges and other elective officials.

---

† This paper was prepared specifically for the Summit on Improving Judicial Selection. The views expressed in this paper are those of the authors and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute.

* Associate Director of Research, National Center for State Courts.

** Professor of Law, Georgetown University Law Center.

1. Edward G. Ryan, Elective Judiciary, Address at the Wisconsin Constitutional Convention (Nov. 30, 1846), *in* 2 THE CONVENTION OF 1846, at 590, 594 (Milo M. Quaife ed., 1919) (contained in Collections, Vol. 27). Ryan also stated:

> Let the judiciary stand on the eternal rock of right, unswayed by all the clamorous waves of opinion chafing [at] its unconscious base—above all influences, above all representation—the representative of eternal and living truth.
>
> Then, sir, it is an idle fiction, a baseless plausibility to say that the principles of our representative government require the election of our judiciary by the people.

Id. at 595. We are indebted to Chief Justice Shirley Abrahmson for this reference.

Executive and legislative officials are elected in all democracies, but the United States is all but unique in having judges stand for election. Consider the role of the judge:

> The ideal judge has integrity. He or she not only appears to be, but actually is scrupulously honest, impartial, free of prejudice, and able to decide cases on their merits without regard to the identity of the parties or their attorneys, his or her own interests, or the likely criticism. The ideal judge is committed to the rule of law—he or she will respect the authority of higher courts, follow existing precedent, and adhere to accepted procedures for interpreting statutes and deciding issues. Finally, the ideal judge is humane. He or she invariably treats all who appear before the court with dignity and courtesy, is sensitive to the special vulnerabilities of victims, children, and disadvantaged groups, and is patient, recognizing that people who resort to the courts have very different backgrounds and abilities. Humaneness is an especially important quality for trial judges, who have the most frequent contact with the public. Of course the ideal judge is impossible to find; judges are, after all, human beings. A good judge, however, deviates from the ideal infrequently and only in minor ways.[2]

An elective official who must act "without regard to the identity of the parties or their attorneys, his or her own interests, or likely criticism" is obviously a very special kind of elective official.[3] A second key difference between judges and other elective officials is that the judge's actions directly impact identifiable parties, usually only very few persons. Individuals contesting in the political process depend on almost always being part of large groups of like-minded people, and also on vigorous electoral accountability. But plaintiffs and defendants are usually alone or all but alone before a judge—they depend mainly on the judge's impartiality and independence. That only increases the need for taking all the steps we can to protect that crucial impartiality.

---

2. SARA MATHIAS, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS 4 (1990).

3. *Id.*

The tension between the judges' fundamental obligations, and the necessity to campaign for election or reelection, is undeniable. The tension turns even more acute as the judge grapples with the fact that the necessity for a campaign means a necessity to raise funds. One way to reduce these tensions is by having merit selection and retention-only elections. However, the search for remedies cannot stop with stating a preference for that solution. Steps are needed to reduce the problems that come with judicial elections, even in some measure, with retention-only elections.

I. THE SIX MAJOR DIFFERENCES BETWEEN JUDICIAL AND OTHER ELECTIONS.

The six major differences between judicial elections and other elections, which render them what may be called "quasi-elections," are:

1) Restraints on Campaign Conduct

Whatever the type of judicial election, judicial candidates are uniquely restricted in what they can say in a campaign.

2) Special Types of Elections

Retention-only and nonpartisan contests are obviously fundamentally different from ordinary elections. These special types of elections are again, obviously chosen because of the differences between the judiciary and other branches. Although the jurisdiction chooses to have electoral accountability for its judges, it seeks to balance that accountability with protection for judicial independence.

3) The Ballot

Ballot length and placement are major shapers of voter participation in judicial elections. In March 1998, voters in Cook County, Illinois faced primary election ballots that included 178 candidates running for twenty-five vacancies on the appellate and circuit courts. In Harris County (Houston), Texas, and Cuyahoga County (Cleveland), Ohio, ballots have traditionally included candidates for as many as fifty or more judicial offices. In all these long-ballot situations, the judicial candidates come at or near the end of the ballot, with the obvious result that fewer votes may be cast for them.

4) Voter Awareness and Participation

Starting as long as forty-five years ago, exit polls and other polls have shown a startling lack of voter awareness of even the names of

the candidates. However, giving voters sufficient information to cast informed votes is costly—and in judicial elections, if that cost is to be met, it is by the candidates' raising funds.

5) The Special Role of Attorneys

While many elective offices have special relationships to particular groups—such as the school boards' relationship to parents and teachers—lawyers and judges have unusual links. Some lawyers are frequently in court, repeatedly before the same judges; and many lawyers, and most firms, will often be in court. Most judges will have former law partners who continue in active practice. And all judges who campaign will turn to lawyers for support, sometimes financial, but often simple endorsement. Even without any formal role in a judicial campaign, lawyers are a leading source of information on judicial candidates. Many judicial campaigns are primarily funded by lawyers' contributions, although that is not a prevailing pattern according to the data we have been able to assemble.

The special role of judicial campaigns and attorneys in those campaigns is, of course, reflected in the status and responsibility of the American Bar Association, with respect to both the Model Code of Judicial Conduct and the Model Code of Professional Responsibility.

6) The Special Role of Name Familiarity

Whatever one's view of the value of famous names in politics, in judicial elections, name familiarity is more important than ever.[4]

When we turn to aspects of judicial campaigns, such as lawyers' contributions to the candidates and the candidates' fund-raising generally, the differences noted above show we must keep in mind how great the difficulty facing judicial candidates is in aiding voters to cast meaningful votes.

II. CHANGES IN JUDICIAL ELECTIONS

"In the past, judicial elections were low-key affairs, conducted with civility and dignity. As a result, they were relatively inexpensive. However, that is no longer the case. Today, in many

4. In a sense, this is not a separate, sixth difference from other kinds of elections, but rather a result that flows from the other differences.

jurisdictions, judicial elections have taken on all of the trappings of partisan politics, significantly increasing the resulting cost."[5]

As one source noted:

> In a sense, what is happening now is the latest swing of a slow-moving pendulum. Earlier in the nation's history, most judges were appointed by governors or mayors. But patronage, not merit, was what got one person appointed instead of another in many cases. So the trend toward electing judges was itself a reform, seen as a way of removing politics and corruption from judicial selection.
>
> Now, as undemocratic as it seems to say it, electing judges is the evil that needs to be reformed. The Bill of Rights, if put to a popular vote, might well not win the support of a majority. So the judges who are charged with protecting those individual rights should also not have to please the majority on Election Day.
>
> [E]very time a state judge promises during a campaign to sentence bad guys to death, capital defense lawyers should challenge the judge's impartiality. Eventually, either through litigation or public opinion, the *current system* has to *change*.[6]

5. The Honorable Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995). The changes in judicial elections have been summed up as making them "noisier, nastier, and costlier." Richard Woodbury, *Is Texas Justice for Sale?*, TIME, Jan. 11, 1988, at 74.

6. Tony Mauro, *Judges Shouldn't Have to Please Voters*, USA TODAY, Oct. 18, 2000, at 17A.