

COMMENT: JUDICIAL SELECTION AND DECISIONAL INDEPENDENCE

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I

Professor Carrington aptly notes that “[p]ublic trust and acceptance of the deployment of government’s power are the proper concern of all but are a special concern of courts and judges.”¹ In our tripartite governmental structure, courts and judges must concern themselves not only with the legislative and executive branches’ exercises of power, but also with their own. Recently, the means of selecting those who exercise judicial power have been criticized as compromising judicial independence. To protect the decisional independence of judges without disturbing the proper balance of control on the exercise of judicial power, substantive reforms to the selection processes should include adjustments in judicial term length, responsible campaign finance reform, and efforts to assure public understanding of the role of the judiciary in our governmental structure.

The focus of this symposium is the exercise and control of judicial power. There are two perspectives from which we may address the structural aspects of the proper balance between control of judicial power—or, to use the language of this symposium, “judicial accountability”—and its exercise. The first perspective is that of the separation of powers. That is, we may consider the appropriate level of *institutional independence* of the judiciary from the other branches of government. Stated differently, we may consider the appropriate level of accountability of the judiciary to the other branches. In our system of checks and balances, we expect neither total judicial dependence nor total judicial independence. The question, then, is the appropriate balance of dependence and independence. For example, we consider the proper scope of judicial review of legislative and executive actions and the appropriate specificity of budgetary control of the judiciary by Congress.²

The second perspective is that of the democratic principle. That is, we may address the degree to which it is appropriate to remove each branch of government from the direct and immediate control of the people. We are speaking

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1. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 80 (Summer 1998).

2. See generally LEARNED HAND, THE BILL OF RIGHTS 42, 68-70, 73 (1958) (discussing the imbalance of power among the three branches of government that results when the Supreme Court of the United States assumes a policymaking role).

here of the special obligation of the courts to the rule of law. To the extent the courts are not just another policymaking branch of government, but are performing the function of assuring the rule of law, there may be a due process interest in protecting the judges' *decisional independence* from the immediate influence of various interest groups.³

These two perspectives on the exercise and control of judicial power are not independent of one another. On the one hand, appointment and confirmation of judges gives the executive and legislative branches potentially much more control of the judiciary than does popular election, and, conversely, by giving judges an independent popular base of support, popular election of judges fosters the institutional independence of the judiciary. On the other hand, life tenure fosters decisional independence in a way that popular election does not.⁴

The focus here is on decisional independence, with only passing attention to institutional independence. Therefore, my comments are addressed to this issue, and must await revision and counterbalance in light of concerns for institutional independence.

II

We may view the methods of judicial selection as forming a spectrum from "partisan" popular election at one terminus to appointment through an "independent" screening committee at the other. It is useful to describe three portions of this continuum: popular election, the Missouri plan, and appointment.⁵

Popular election, at one end of the spectrum, refers to direct contested election of judges by the public. Such elections may be "partisan" or "nonpartisan"—the candidates run under a political party label or without such a label.⁶ Judicial elections, of course, enjoy the advantages and suffer the dis-

3. See generally *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (noting that "due process requires a 'neutral and detached judge'").

4. See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that the life tenure of federal judges "is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws").

5. Any of these selections may be for any term of service, from as little as one or two years up to and including life tenure—or, more accurately, something like "good behavior." See, e.g., U.S. CONST. art. III, § 1 (providing that Article III federal judges shall hold their offices during "good Behaviour"); ALA. CONST. 1901 amend., 328 § 6.15 (providing that judges elected to office in Alabama serve for a term of six years); MO. CONST. 1945 art. V, §§ 19, 25(a)-(g) (providing for the merit selection of judges for terms of 4 to 12 years who are then subject to retention elections).

6. The adjective "partisan" is unfortunate because of its connotation. What is meant by "partisan" is no more than that judicial candidates are associated with political party labels. In this context, the term "partisan" is not used to describe how a judge carries out judicial responsibilities once elected. No one would disagree that judges should be nonpartisan in carrying out their responsibilities. Surely this does not distinguish judges from, for example, school board members or governors who should be nonpartisan in the performance of their responsibilities. Performance once in office, however, is distinguishable from the method of selection of governmental officers. For example, there are advantages and disadvantages to the availability of political parties to help candidates in their campaigning and to help the public identify the candidates' judicial philosophies.

advantages inherent in the political process.⁷

At the opposite end of the spectrum from popular election is appointment. Appointment refers to the selection and appointment of judges by another political officer, typically the chief executive officer. Such appointment may be wholly within the discretion of the appointing officer, the appointing officer may be required to obtain advice and consent (typically from a legislative body), or the appointing officer may be required to choose from a list of possible appointees (typically aspirants are selected by a screening committee, usually a standing committee that was itself selected by one or more political officers or professional or quasi-governmental groups).

The Missouri Plan lies on the spectrum of judicial appointment and retention systems between popular election and appointment. It is a system that combines original appointment with a subsequent retention election. While any form of appointment procedure may be combined with any form of election, typically a Missouri Plan state will combine (1) appointment by the Governor from a screening committee list with (2) a nonpartisan, uncontested re-

7. See HAND, *supra* note 2, at 73-74. It is interesting to compare Plato's distaste for allowing the populace to choose government officers with Judge Learned Hand's distaste for being ruled by judicial officers who are unaccountable "Platonic Guardians." Plato illustrated his distaste for allowing what he conceived as an easily misled populace to serve as "master" of the ship of state:

Conceive something of this kind happening on board ship, on one ship or on several. . . . Each man thinks that he ought to navigate, though up to that time he has never studied the art, and cannot name his instructor or the time of his apprenticeship. . . . Then they rule the ship and make free with the cargo, and so drinking and feasting make just such a voyage as might be expected of men like them. Further, they compliment any one who has the skill to contrive how they may persuade or compel the master to set them over the ship, and call him a good seaman, a navigator, and a master of seamanship; any other kind of man they despise as useless. They have no notion that the true navigator must attend to the year and the seasons, to the sky and the stars and the winds, and all that concerns his craft, if he is really going to be fit to rule a ship.

PLATO, THE REPUBLIC 170-71 (A.D. Lindsay trans., Alfred A. Knoff 1992). Judge Learned Hand, in his Oliver Wendell Homes Lectures to Harvard Law School, commented on the danger of unaccountable judges imposing social policy from the bench:

[I]t certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve.

. . . .

Each one of us must in the end choose for himself how far he would like to leave our collective fate to the wayward vagaries of popular assemblies. . . . We are not indeed forced to choose between absolutism and the kind of democracy that so often prevailed in Greek cities during the sixth to fourth centuries before our era. The Founding Fathers were acutely, perhaps over acutely, aware of the dangers that had followed that sort of rule, though, as you all know, they differed widely as to what curbs to impose. For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.

. . . .

. . . I can think of nothing better than to stake our future upon conclusions about ourselves that we must recognize as provisional, as no better than surmises which we must never weary of putting to a test.

HAND, *supra* note 2, at 73-74.

tention election held a couple of years after the appointment is first made.⁸ Subsequent periodic retention elections may follow.

I do not here advocate one system over another. Instead, I note that what is appropriate for the federal judiciary, for example, may or may not be appropriate for the judiciary of a particular state, and that what will work quite well for one state with its particular governmental and social structure may not be best for another state with a somewhat different governmental structure, history, and experience.

As the American Bar Association, judges, lawyers, and legislators consider methods to improve judicial selection, I would urge three considerations. First, consider what level of popular control is appropriate in a particular state. The answer to this question will depend on, among other things, the level of the public's confidence that a judge will foster the rule of law rather than implement the judge's own public policy predilections. If judges act, or are inclined to act, as a "superlegislature,"⁹ the electorate may choose to control judges in the way it does the legislature.

Second, consider what frame of reference is appropriate. A reporter asked me after my election to the court whether I would rather have been appointed to the office, thus avoiding the political battles leading to my election. The answer for most judges would be, "Of course."¹⁰ The idea of being spared all that goes into an election campaign and simply walking into office is attractive. But what would be easiest for me or another judge is not, I believe, the proper test.

8. See Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK L.J. 281, 282-84 (1995); Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 512 (1978).

9. See *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) (reflecting on substantive due process and its transformation of the Supreme Court into a "superlegislature").

10. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (discussing a "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). Though the political process subjects judges to substantial criticism, I note that public criticism of public acts is not inconsistent with fundamental notions of democracy. In *New York Times Co. v. Sullivan*, the Supreme Court of the United States defended free political speech that criticized judges:

Injury to official reputation error affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. . . . This is true even though the utterance contains "half truths" and "misinformation." . . . Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. . . . If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," . . . surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

Id. at 272-73 (citations omitted). In discussing the price of harsh public criticism, the Supreme Court quoted Judge Learned Hand:

The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

Id. at 270 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

It is understandable that incumbent judges might prefer not to have to stand for re-election,¹¹ or, if they must, that they would prefer no opponent (that is, an uncontested retention election, or, if that is not possible, a nonpartisan election).¹² Each step from life tenure toward contested election with the support of a party mechanism enhances the ability of a challenger. But whether it is intrinsically preferable not to elect judges, or not to allow effective challenges to sitting judges once they have taken office, is not a question that should be answered solely on the basis of what incumbent judges would prefer. Rather, the question should be phrased more broadly: What system offers the public the level of judicial accountability that is appropriate to the way in which judges function and are expected to function in their jurisdiction?

Third, consider critically the factors that have caused concern: the tone of judicial elections, and the large expenditures on judicial campaigns. There is a great deal of discussion as to how crucial to its effectiveness public confidence in the judiciary is. It is no doubt true that public confidence in the judiciary is the basis for its effectiveness. While the same thing can be said of all government, it may well be more true of the judicial branch in a tripartite government because the judiciary lacks both force of arms and the power of the purse. Having said this, I cannot conclude that mere palliatives are called for. If the tone of judicial elections and the large expenditures on them are not real problems, then the public should be informed as to why they are not. If they are, as I believe they are, real problems, then real steps should be taken to address those problems. All I suggest here is that a change from an elective to an appointive or Missouri Plan system is more in the nature of a palliative, because the same problems of tone and large expenditures are present—perhaps in an even more pernicious form—in those systems. Substantive corrective action should address the substantive problem.

There is little if any discernible difference in tone among the contested partisan elections in Texas and Alabama, the Missouri Plan retention elections of Penny White in Tennessee and Rose Bird in California, and the confirmation hearings of Robert Bork and Clarence Thomas in the United States Senate. Nor is there any reason to believe that removing party labels would somehow mute the critics who oppose these judges. Judicial races are rarely about political party—though they may be about judicial philosophy, and political party

11. In dissenting from the adoption of an amendment to the Alabama Canons of Judicial Ethics which limited the campaign speech of judicial candidates, I stated:

It is understandable that judges would wish to protect themselves and their families from public criticism. Recent judicial candidates are not alone as targets of indecent and improper attacks. Since the founding of our nation, decent men and women have had their reputations maligned because they cared enough about their neighbors and their nation to offer themselves for public service or to challenge the practices or vision of officeholders who fell short.

Order Adopting Amendment to Canon 7, Ala. Can. Jud. Ethics (Aug. 14, 1997), available in LEXIS, Ala Library, Alcode File (See, J., concurring in part and dissenting in part) (footnote omitted).

12. See Task Force on Judicial Elections, A Consensus Statement of the Task Force on Judicial Elections 2 (Jan. 21, 1997) (unpublished report examining Alabama law and rules governing judicial elections handed to the Chief Justice and on file with the author) (recommending that “appellate circuit, and district court judges, in this [s]tate, be elected in nonpartisan elections”).

may be a surrogate for judicial philosophy. Where, as for example in Tennessee¹³ or California,¹⁴ there has been a vigorous attack on a sitting judge, the issue—abortion or the death penalty—has been raised and the campaign funded by a special interest group, not by a political party.

Judicial selection and retention can be affected by advertising that attacks a judge or judicial candidate on improper grounds, or by improperly influencing or “capturing” the officer or committee that appoints or selects judges or selects the list of judicial aspirants from which a choice is made. In the final analysis, the question is whether the people—in whose hands all political decisions ultimately lie—appreciate the importance of the rule of law to their freedom and happiness and the function of the judiciary as its guardian. We cannot expect full public appreciation of the judicial function if the judiciary does not fulfill its educational function. Justice Brandeis’s clerks report that he often commented on drafts of his opinions, “The opinion is now convincing. What can we do to make it more instructive.”¹⁵ It is imperatively the duty of the judiciary to assure that the bar and the public understand what judges do,¹⁶ and it is no less the responsibility of lawyers to understand that role, to act consistently with that understanding, and to impart that understanding to the public.

The second matter of concern is the increasingly large sums of money spent on judicial elections. (It is certainly true that larger and larger sums are being spent on judicial elections.) It is not reasonable to suggest that the expenditure of such large sums on judicial elections has no effect on public confidence. It is, however, a mistake to believe that this problem is present only where judges are elected. Large sums were spent in retention elections to defeat Rose Bird in California and Penny White in Tennessee. More significantly, large sums were spent by supporters of certain California justices in 1998 to assure their retention.¹⁷ It is also reported that, in recognition of the expensive national campaign against Judge Bork, there was an expensive national campaign in

13. See Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310 (1997) (discussing the retention election of Penny White, Associate Justice of the Supreme Court of Tennessee).

14. See Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge’s Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1981 (1988) (discussing the retention election of Rose Bird, Chief Justice of the Supreme Court of California).

15. OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 84 (Kermit L. Hall ed., 1992).

16. As Justice Holmes stated:

People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves [that is, public enforcement of judicial decrees], and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of public force through the instrumentality of the courts.

Oliver Wendell Holmes, Jr., *The Path of the Law*, in THE COMMON LAW & OTHER WRITINGS 167, 167 (Leslie B. Adams, Jr., 1982) (1897).

17. See generally Maura Dolan, *California and the West; California Elections/Judiciary; Members of High Court Face Ouster Attempt; Anti-Abortion Activists Target Two Republican State Justices Who Are Raising Money and Fighting Hard for Retention*, L.A. TIMES, Oct. 18, 1998, at A3 (discussing fundraising efforts by incumbent Justices of the Supreme Court of California).

support of Clarence Thomas during his confirmation hearings.¹⁸ A major difference between spending in popular elections and spending in retention elections and appointment processes is that in popular elections the spending must be reported and the decisionmakers can take into account who is spending for and who is spending against the candidate. Thus, while campaign finance reform is certainly desirable, it should be finance reform that recognizes the realities of popular electoral campaigning and that reaches retention election spending and spending to influence the appointment process.

III

I suggest three components of a solution. First, as has been noted elsewhere in this symposium, term length is a key component in determining the balance between judicial independence and judicial accountability.¹⁹ Second, there should be campaign finance reform that recognizes that where popular election—contested or uncontested—is the chosen mechanism of judicial selection, there must be a meaningful election that is sufficiently funded to communicate effectively with the public. At a minimum, campaign finance reform should take the form of disclosure, preferably as close to instantaneous as possible. It should also provide for some measure of separation of the judicial candidate from the direct, personal solicitation and the receipt of campaign contributions.²⁰ Third, there is a need for ongoing public education as to the nature and importance of our system of the rule of law and the role of lawyers and judges in that system. This education should not be the responsibility of a separate public agency subject to capture by an interest group, but should instead be a project of judges, lawyers, bar associations, newspapers, civic groups, and others to advance the rule of law, the separation of powers, and the role of the judiciary.

18. See Lyle Denniston & Arch Parsons, *Rights Groups Await NAACP's Call on Thomas Nomination*, BALTIMORE SUN, July 31, 1991, at 3A.

19. For example, an initial term of two to four years followed by a subsequent term of eight to ten years could stress accountability initially and independence over time.

20. On August 14, 1997, the Supreme Court of Alabama amended Canon 7 of the Alabama Canons of Judicial Ethics to provide:

A candidate [for judicial office] shall not personally solicit campaign contributions. A candidate may, however, establish committees of responsible persons to solicit and accept campaign contributions, to manage the expenditure of funds for the candidate's campaign, and to obtain public statements of support for his or her candidacy. Such committees may solicit and accept campaign contributions and public support from lawyers.

Order Adopting Amendment to Canon 7, Ala. Can. Jud. Ethics, app. (Aug. 14, 1997), available in LEXIS, Ala Library, Alcode File (Canon 7(B)(4)).