SMU | Dedman School of Law

SMU Law Review

Volume 40
Issue 6 *Special Issue*

Article 4

January 1987

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by

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EACH individual's view of the problems or benefits associated with either election or merit selection depends upon how that individual strikes the balance between the seemingly conflicting goals of public accountability and judicial independence. At the outset, it should be noted that merit selection *per se* is hardly a debatable topic. Everyone can readily agree that judges should be selected on the basis of merit. The real problem, and the source of much legal and political controversy, is which *method* to use to select the best qualified individuals. A secondary question, which will not be addressed here, is what qualifications should be considered in making that selection. Thus, to speak about merit selection as a particular method of judicial selection is misleading; merit selection is the desired end result.

Proponents of the partisan election of judges assert that popular election insures public accountability. Critics of partisan elections, however, view popular election as fraught with problems that necessarily compromise judicial integrity and independence.

Historically, partisan elections led to the domination of the process of judicial selection by political machines. Although today the influence of political machines in many locales has been considerably reduced, single party domination of local politics is not uncommon. A recent series of articles in the St. Louis Post-Dispatch focused upon the problems surrounding the partisan election of judges in Illinois. Illinois, Texas, Arkansas, and West Virginia are the only states in which judges are selected exclusively by partisan election. The Post-Dispatch articles pointed out that in heavily Democratic Cook County, in metropolitan Chicago, only twenty-seven of the 177 elected judges are Republicans.[1] Certainly, those statistics would discourage even the most qualified Republican candidate from running for judicial office.

The Post-Dispatch articles also pointed out that many qualified candidates of both political parties were discouraged from running for judicial office by the high cost of judicial campaigns. In 1984, one Illinois Supreme Court justice spent $300,000 in his successful campaign for retention in office. His opponent, an appellate court judge with seventeen years experience, spent $122,000.[2]

Many would-be judicial candidates were dissuaded from running by the prospect of campaign fund-raising. In Illinois, judicial campaigns are almost

1. Gauen, *Politics on the Bench* (pt. 1), St. Louis Post-Dispatch, Jan. 26, 1986, at B6.
2. *Id.* at B1.

exclusively financed by lawyer contributions. Although the judges interviewed for the Post-Dispatch articles denied that contributions influenced their decisionmaking, critics of partisan elections point out that contributions create at least the appearance of partiality.[3]

Critics of partisan elections also discount the role of the public in selecting judges by popular election. Such critics note that the public is often poorly informed about judicial candidates and their qualifications, and that judicial campaigns are generally not informative. Moreover, judicial candidates are constrained from taking stands on controversial issues or specific cases by the Judicial Code of Conduct. Although local bar associations publish the results of lawyers' polls about the qualifications of judicial candidates, these polls receive little, if any, media attention.

Furthermore, in large metropolitan areas, the number of candidates running for judicial office can be staggering. In 1986 there were eighty-eight judicial candidates in the primary election for Cook County alone.[4] One lawyer-legislator, who is also a leading critic of partisan elections for judges and who has introduced legislation to adopt merit selection in Illinois, stated that she did not know eighty percent of the names on the ballot.[5]

It has been assumed that the election of judges would open the judiciary to women and members of minority groups. One concern has been that merit selection nominating commissions could emphasize professional qualifications and experience to camouflage what are essentially exclusionary or discriminatory selection criteria or procedures. For example, one criterion often cited is that an applicant have fifteen years of legal experience, including wide experience in trial matters. Although length of legal experience is undoubtedly a legitimate consideration, it sharply reduces the number of eligible women and minority candidates. A recent study cited in the *National Law Journal*, however, disputes the theory that partisan elections necessarily increase minority representation on the bench.[6] According to the study, the greatest number of women and minorities serving on the bench have been appointed, not elected.[7]

To remove partisan politics and other problems associated with the election of judges, many states have adopted merit selection. In 1940 Missouri became the first state to adopt merit selection, and the "Missouri Non-partisan Court Plan" has been used as a merit selection model by many other states. The Missouri Plan applies to the selection of trial judges in the St. Louis and Kansas City metropolitan areas and to the selection of all appellate judges, including Missouri Supreme Court Justices. Trial judges in the rest of the state continue to be elected in partisan elections.

The Plan provides for judicial nominating commissions, which are comprised of a judge and an equal number of lawyers and lay persons. The

3. Gauen, *Politics on the Bench* (pt. 2), St. Louis Post-Dispatch, Jan. 27, 1986, at B1.
4. Gauen, *supra* note 1 at B1.
5. *Id.* at B6.
6. Nat'l L.J., Dec. 30, 1985, at 1.
7. *Id.*

Appellate Judicial Commission has seven members, with the Chief Justice of the Missouri Supreme Court serving as the judicial member. The Circuit Court Nominating Commissions have five members, with the chief judge of the appellate district in which the circuit court is located serving as the judicial member. The lawyer members of the nominating commissions are elected on a non-partisan basis by local bar association members and serve staggered six-year terms. The lay members are appointed by the governor to staggered six-year terms.

When a judicial vacancy occurs, the appropriate judicial nominating commission selects three persons and forwards their names to the governor, who then selects one for the appointment. If the governor fails to appoint one of the three nominees within sixty days, the nominating commission appoints one of the three nominess. This last provision was added to the Missouri Plan in the 1950s to avoid a situation in which the governor refuses to appoint any of the nominees.

After serving at least one year, the appointed judge faces a retention election at the next general election. A simple majority is needed for retention. Recently, there have been proposals to increase the percentage necessary for retention to sixty percent. As with partisan elections, the public is often poorly informed about the judges in the retention election. Missouri bar polls receive little publicity. So far, all the judges who have been appointed under the Missouri Plan have been retained.

In theory, the Missouri Plan balances the competing interests of public accountability and judicial independence and, at the same time, fosters public confidence in the judiciary by selecting the best qualified candidates on the basis of merit and ability. The Plan also encourages well-qualified lawyers to consider a judicial career by providing for independence and long tenure.

Recently, however, the merit selection of judges in Missouri has received much media attention and public criticism based upon allegations that *judicial* politics have replaced *partisan* politics in the judicial selection process. For example, in 1982 one Missouri Supreme Court justice was accused of engineering the nomination of three judicial candidates whom he regarded as compatible with the court. The state Commission on Retirement, Removal and Discipline of Judges investigated the allegations and ultimately found no probable cause that the justice had committed any wrongdoing.

These serious allegations of improper judicial influence upon the judicial selection process prompted the state bar association and the Missouri Senate to form committees to study and investigate the current operation of the Missouri Nonpartisan Court Plan. The State Senate Report[8] found no major structural flaws in the Missouri Plan. The Senate Report, however, found "very evident" problems with the operation of the Missouri Plan due to the "inability of the bench and bar to meet their considerable responsibili-

8. MISSOURI SENATE INTERIM COMMITTEE, REPORT ON THE NONPARTISAN COURT PLAN (Jan. 24, 1986).

ties under the plan."[9] The Senate Report further noted that "[m]embers of the bar have come to accept widespread politicking for judicial appointments," with the result that the concept of "merit" selection has devolved into a test of lobbying skills. The report stated that "[t]he role of the public has been reduced significantly below that [originally] envisioned," and that "the public's voice in retention elections is meaningless."[10]

In order to reduce the influence of the bar and the bench and to increase the role of the public, the Senate Report recommended that the judicial member of the nominating commission serve in a nonvoting capacity and that the number of lay members be increased by one.[11] In addition, the Senate Report found that because the nominating commission procedures were informal, they were subject to manipulation and to lobbying efforts. The report, therefore, recommended that nominating commissions adopt uniform interviewing and voting procedures.[12]

The State Bar Association Report[13] found that the Missouri Plan worked effectively and had produced a high quality judiciary. Unlike the Senate Report, the Bar Association Report rejected suggestions to remove the voting rights of the judicial member and to increase lay representation on the nominating commissions.[14] The Bar Association Report agreed in substance, however, with the Senate Report's recommendation that the nominating commissions needed to formalize their interviewing and voting procedures. The Bar Association Report recommended that the Missouri Supreme Court promulgate a procedures manual, which would include standards for evaluating candidates as well as uniform interviewing and voting procedures.[15]

The lack of meaningful standards for evaluation of judicial candidates is rather unsettling in view of the emphasis placed upon professional qualifications in merit selection. The primary objective of merit selection is, after all, the selection of judges with superior professional and personal qualifications.

To preclude even the appearance of impropriety and lobbying for judicial nominations, the Bar Association Report also proposed promulgation of supreme court rules to define the scope of permissible judicial activities, to require that all written communications received by one nominating commission member be forwarded to the entire nominating commission, and to require that any oral communication with nominating commission members be reduced to writing.[16] In addition, the Bar Association Report specifically recommended promulgation of a rule barring a nominating commission member from initiating or receiving any communication from the governor about any candidate for a vacancy before the nominating commission selects

9. *Id.* at i.
10. *Id.* at ii.
11. *Id.* at iii.
12. *Id.* at iv.
13. MISSOURI BAR ASSOCIATION SPECIAL COMMITTEE TO REVIEW AND EVALUATE THE MISSOURI NONPARTISAN COURT PLAN, REPORT TO THE BOARD OF GOVERNORS OF THE MISSOURI BAR (Jan. 15, 1986).
14. *Id.* at 12-13.
15. *Id.* at 16-18, 20-21.
16. *Id.* at 19-20.

the three nominees.[17] This suggestion was proposed in response to another problem of merit selection, the problem of pre-selection.

Perhaps the most serious flaw of the Missouri Plan is pre-selection. Pre-selection strikes at the heart of the underlying premise of the Missouri Plan: the selection of judges on the basis of professional qualifications, not political affiliation. An illustration of pre-selection follows. Suppose there is a judicial vacancy for which the governor has favorably mentioned one particular individual. Subsequently, the nominating commission selects a panel of three nominees that, by coincidence, includes the individual favored by the governor. The governor then appoints that individual to the vacancy. Many court-watchers in Missouri suspected such pre-selection was involved in 1985 when the governor appointed his thirty-three year-old chief of staff to the state supreme court over two experienced appellate judges.

Has merit selection removed the judiciary from the "contamination of partisan politics"? It is unlikely that it has. Has merit selection removed judicial politics from the judicial selection process? Again, it is unlikely. There is general agreement among commentators that the Missouri Non-partisan Court Plan has not been completely successful in eliminating either partisan or judicial politics from the judicial selection process. Rather, the Plan has been successful only in altering, to a certain extent, the role played and the degree of influence exerted by such politics. Merit selection appears to have changed the way that politics influences judicial selection, but the partisan and political features have merely been obscured, not eliminated. Although it may be impossible to completely eliminate political influence in the judicial selection process, it is imperative that efforts to reform the judicial selection process continue in order to increase the process's "merit selection" component.

17. *Id.*