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Norman Krivosha

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ACQUIRING JUDGES BY THE MERIT SELECTION METHOD: THE CASE FOR ADOPTING SUCH A METHOD

by

Norman Krivosha

Charms strike the sight, but merit wins the soul.¹

EXACTLY eighty years ago, Roscoe Pound, in delivering his now famous 1906 address to the American Bar Association, said in part: "Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."² It appears that the passage of time has done little, if anything, to refute the observations made by Pound in 1906. Fortunately, the advent of the merit selection system now employed by many states in selecting judges has, to a large extent, removed the judiciary from the political arena. Under a pure merit selection system, a bipartisan commission chooses a slate of qualified candidates from which the executive branch selects. A careful comparison of those jurisdictions in which judges are popularly elected with those jurisdictions in which merit selection is employed will disclose that the popular election of judges has not provided the citizenry with any meaningful benefits, while the merit selection system has minimized many of the problems involved in attempting to create an independent and responsible judiciary.

Part of the difficulty in deciding which of the two systems, elected versus appointed, should be employed is brought about by reason of our failing or, perhaps worse, refusing to understand the role of the judiciary in a democratic society. In many jurisdictions the election of judges is considered to be the only "democratic" way of creating a judiciary. This notion of an elected judiciary has not always prevailed in America. Initially, following the American Revolution, judges were appointed. The advent of the Jacksonian era and its emphasis on democratic populous ideals, however, promoted and instilled in the hearts and minds of Americans the notion that everyone, including judges, should be popularly elected and subject to the will of the people.³ Yet, by considering the judiciary in the same light as the executive

1. Alexander Pope, *The Rape of the Lock*, in *THE POETRY OF POPE: A SELECTION* 44 (Abrams ed. 1954).

2. Pound, *The Cause of Popular Dissatisfaction with the Administration of Justice*, 46 *JUDICATURE* 66 (1962).

3. Percy, *Should State Judges be Elected or Appointed?*, 31 *LA. B.J.* 274 (1984).

and legislative branches of government, we miss the entire point and purpose of a judicial branch of government. It is not that judges are better than those who hold office in the other two branches of government and for that reason should not be subject to the will of the people. Rather, to suggest that a judge's decisions should be subject to review by the populace is to fail to understand the duties and functions of a judge.

It makes perfectly good sense in a free, democratic society to suggest that the people's representatives occupying the legislative branch of government should be selected by the people whom they are to represent. Likewise, it makes perfectly good sense to suggest that the head of the executive branch of government should be selected by the people whom he or she represents. It makes no sense at all to talk about representation when examining the judicial branch of government. Legislators have constituents and, therefore, should be popularly elected. Governors have constituents and, therefore, should also be popularly elected. Judges are prohibited by law from having constituents;⁴ therefore, subjecting them to popular election is totally without reason.

One need only study the life cycle of a state law to quickly recognize the fallacy of a popularly elected judiciary. Assume that a bill is introduced before a state legislature. One hundred opponents, wishing to have the bill killed not because it is illegal but only because it is contrary to their wishes, may very appropriately hire a bus, drive to the state capitol, and caucus with their respective representatives. They may advise their representatives that the bill is contrary to their best interests and urge each representative to vote against the bill. They may even threaten each representative that should he or she fail to vote against the bill, these 100 and many more will publicly campaign against the representative when next he or she seeks public office, advising the populace that the representative voted in favor of the legislation though it was not in the best interests of a particular group. Should the legislator, however, determine that those 100 people do not represent the majority who elected the representative to office, he or she may decide to vote for the bill notwithstanding this display of opposition. This simply reflects the democratic form of government. Citizens have a right to at least attempt to persuade members of the legislative branch of government to respond to the will of the people.

Likewise, if the bill is passed, and sent to the governor for signature, these same 100 people can properly once again board their bus, come back to the capitol, and caucus with the governor in an effort to persuade the governor to veto the bill. They can frankly tell the governor that they are not concerned about the legality of the bill, and that all they care about is that the bill is contrary to their best interests. They may even threaten the governor that if he or she does not veto the bill, when the governor seeks reelection to office, not only will the governor not have the support of this interest group, but this interest group will spend time and money actively seeking the gover-

4. CODE OF JUDICIAL CONDUCT Canon 3 (1972).

nor's defeat. If the governor determines that the individuals do not represent a significant majority, the governor may, nevertheless, sign the bill. Once again, this is democracy in action.

If after the legislature passes the bill and the governor signs the bill into law, however, one wishes to attack the constitutionality of that law, a different situation develops. Assume that the law is now under attack in the state supreme court. Once again those 100 individuals travel to the state capital to meet with the chief justice for the purpose of attempting to convince him or her that unless the chief justice commits to them that the court will declare the act unconstitutional, these 100 will actively campaign against the chief justice when next he or she seeks public office. What is the reaction of the public if they learn that the chief justice, being a more astute politician than either the representative or the governor, recognizes that these 100 people have much to offer and agrees that when the court sits to hear argument it will declare the act unconstitutional? In return for that commitment, the chief justice simply requests that when next he or she runs for reelection this group not only will provide significant financial support, but will also work hard for the chief justice's reelection.

The end of this scenario may seem unreal and outlandish; surely no one would attempt to so pressure a court, and no group would attempt to travel to the court for that purpose. If it is true that no group would so attempt to pressure a court nor make its will known, why subject the decision-maker to the will of the people by requiring a judge to be popularly elected?

Webster defines "judge" as "one that judges" and defines "judging" as the act of "deciding on the merits a matter."⁵ Nowhere in that definition does the will of the people play any part at all. To suggest that somehow it is appropriate to hold judges accountable to the will of the people when the will of the people has nothing to do with their function is like suggesting that the public periodically vote on whether a geriatrics specialist who does everything medically proper, but whose patient dies because of old age, should be permitted to continue practicing medicine. A judge who decides a case, not upon the merits but, rather, upon what he perceives to be the will of the majority, is subject not only to ridicule but also to removal from office.⁶ Why, then, should we on the one hand, suggest that it is unethical to decide cases solely because the decision is popular though legally incorrect and, on the other hand, base the judge's right to continue serving upon whether his or her decisions are popular with the people, even though they may be contrary to the requirements of law? Unless and until that dichotomy in reasoning is resolved, no basis for popularly electing judges makes sense.

Even assuming that judges should somehow be sensitive to the will of the people, how does a judge or, more particularly, a collegial court, determine the will of the people? Imagine what the reaction would be if a chief justice in preparing an annual budget sought appropriations for the purpose of peri-

5. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1968).

6. MODEL CODE OF JUDICIAL CONDUCT Canon 7(c) (1972).

odically retaining pollsters to assist the court in determining the will of the people. Imagine the reaction of the people if they should receive a survey in the mail advising them that three weeks hence the court will pass on the constitutionality of a newly-enacted tax law, and, in advance of that decision, the court would be grateful if the citizens receiving the survey would advise the court how they felt about the matter and how the court should decide the case. And if, once again, it is suggested that such action is obviously ridiculous, then how is the court to know what is the will of the people?

The examples that have been given here are nonsensical. If, however, courts are not supposed to pay attention to the will of the people, even if they could know and determine the will of the people, then a system that brings judges to office and implicitly requires them to know the will of the people and act in accordance therewith is equally nonsensical. The process of selecting a judge should produce an individual who, like a referee in a sporting event, will serve as an impartial arbitrator, willing to set aside his or her own individual views and the views held by the populace in order to decide the matter based upon the merits in accordance with existing law.⁷

The notion is accepted that a referee in a basketball game must call the fouls in accordance with the rules, whether or not the public likes the rules and whether or not the majority present supports the team against whom the foul is called. To subject each call to a vote of the fans in the audience would obviously make for chaos. The analogy to the judicial branch of government is obvious. Popular election of judges has little relationship to good judgment or to the question of whether a judge has faithfully followed his or her oath and, therefore, should be retained in office.

By permitting the popular election of judges, the public fails to understand that judges do not make decisions based upon their views or the views of the public but, rather, on the law's view on the matter. If the law is unpopular, then it is incumbent upon the people to persuade their representatives in the other two branches of government to change the law. That is where the public pressure properly should be applied. Unless and until the public succeeds in convincing the other two branches of government to bring about a change, the judicial branch is dutybound to follow the law.

It is a popular notion these days to want judges who are "strict constructionists." The term "activist judge" is often used as a denigrating label. Yet, even if a judge strictly construes the law and thereby reaches a result that is unpopular, that judge often is subject to public criticism and the threat of ouster from office. One should not be permitted to run against an incumbent judge on the promise that he or she will ignore the law and abide by the will of the people. For an individual seeking election to judicial office to promise in advance how he or she will decide a case without first hearing the evidence is completely improper.⁸ Such a legal system would result in chaos in this country.

7. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1972).

8. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1972).

How, then, has the system worked as well as it has in those jurisdictions that continue to elect judges? It has worked simply because in those jurisdictions where judges are popularly elected, most often judges are "selected" to office, but without merit. The noted jurist and legal scholar Arthur Vanderbilt observed that the only thing that has saved the popular election of judges in America is the fact that most often they are initially appointed to fill a vacancy and thereafter run unopposed.⁹ Thus, to suggest that such a system is any different in effect than a merit selection system is, of course, false. The only difference is that in the popular election of judges a bipartisan commission, which is generally found in the merit selection system, has no voice in culling out the unqualified by compelling the executive branch to select from a list of qualified candidates.

In 1979 the jurisdictions that had merit selection systems were polled by the American Judicature Society. Almost without exception, the conclusion was that the quality of the bench had improved by reason of a state adopting the merit selection system.¹⁰ That result should not seem strange. Relatively few successful practitioners, that is, senior partners of large firms, are willing to sacrifice a year or more in campaigning for office without knowing whether they will be elected even after all the time and resources that have been invested. Not only is there the matter of expense, but, more importantly, there is the concern on the part of the candidate that by seeking the office, the individual may cause alarm among his or her clients. As a result, it is seldom that an experienced lawyer throws his or her hat into the political ring.

Moreover, there is no question but that the merit selection system affords greater opportunities for women and minorities to find their way to the bench. To be sure, one may find women and minority judges in jurisdictions that elect. Nevertheless, experience discloses that the merit selection system will more rapidly provide women and minorities with opportunity than will the election process.¹¹

Another matter of grave concern, which is seldom discussed when one compares the merit selection system to the popular election system, is the issue of campaign funds. How does a judge collect campaign funds without creating the appearance of impropriety? One may be the most ethical individual in the world and, yet, if one must seek funds as the other two branches of government do when running for office, one inevitably creates the appearance of impropriety. It is nearly impossible in today's costly election process to be able to garner the kind of dollars necessary for statewide election without becoming identified with various interest groups. How does

9. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U.L. REV. 1, 37 (1956).

10. American Judicature Society, *Judicial Selection Update: How Commissioners Rate Their Own Judicial Selection Plans (1979)* (paper presented at conference, *Merit Selection 1979: Merit Selection of Judges . . . How Is It Working?*, sponsored by American Judicature Society, Institute of Judicial Administration, and Fund for Modern Courts, Inc.).

11. Fund for Modern Courts, Inc., *Success of Women and Minorities in Achieving Judicial Office: The Selection Process* (Dec. 1985).

a judge maintain his or her appearance of impartiality and propriety if he or she is identified as a "labor judge" or as a "management judge" or as a "plaintiff's judge" or as a "defendant's judge?"

Another serious question is from whom are the funds to be solicited? Obviously, one must solicit from all lawyers practicing before the court. All lawyers, obviously, want to contribute to the campaign of a sitting judge! And what of litigants? May one solicit funds, even through a committee, from individuals who have cases pending before the court without creating the appearance of impropriety in at least the minds of those solicited? What of the large companies who are always before the court? Can they refuse to make a contribution when solicited by the judge's committee? One may argue that the judge is insulated from knowledge as to the source of funds. The judge may well be insulated but one might seriously doubt whether the public who is solicited either knows or believes that to be the fact. This is particularly so when, even though a candidate is required to solicit funds through a committee, the candidate nevertheless attends fundraising events and sees who is present and who is absent. How does one who is not an incumbent raise funds to challenge an incumbent sitting judge? How many are so brave as to publicly acknowledge association with one who challenges the sitting judge, knowing full well that in most jurisdictions public accountability laws makes their contribution a matter of public knowledge in short time?

While collecting campaign funds before election is enough of a problem, what of those instances when sufficient funds have not been collected before election? Can a judge, even through a committee, collect funds to pay off a campaign debt following election without creating the appearance of impropriety? Even though the merit selection system has a periodic retention vote component, the judge stands for retention without the need of spending any money in most instances. A jurisdiction that has a well-run, meaningful judicial qualifications commission and a meaningful, well-run public judicial poll has all the tools it needs to remove those few judges who are not worthy of remaining in office without subjecting all others to their loss of necessary independence.

It is interesting to note that a Special Commission on the Administration of Justice in Cook County, Illinois, created to conduct a wide-ranging study of the state circuit court, in part as a result of the now famous "Graylord Scandal," reports that "the time has come for a fundamental change in the way judges are selected in Illinois. Nothing less will restore public confidence in our judicial system."¹² The report goes on to say: "We see three defects with the current system:—Too many of the best qualified candidates are not selected.—Judicial independence is undermined.—The election and retention processes fail to provide meaningful accountability to the public."¹³

12. SPECIAL COMMISSION ON THE ADMINISTRATION OF JUSTICE IN COOK COUNTY, A REPORT ON JUDICIAL SELECTION 1 (Oct. 1985).

13. *Id.*

The report supports much of what has been suggested here. The report further states:

Given the method of judicial selection in Cook County, it is not surprising that the testimony before our Commission indicates a serious lack of judicial independence in Cook County. Along the way to the bench, judicial candidates become embroiled in reciprocal obligations to political sponsors, ward and township committeemen, as well as to campaign contributors, many of whom are likely to be attorneys who will appear before the judge. Too many judges feel obliged to return these favors. . . . One aspect of judicial elections—campaign fundraising—has a particularly corrosive effect upon public perceptions of judicial independence. Even the requirement in Illinois that judicial candidates must raise money through a campaign committee does not shield the candidate from fundraising. . . . No matter how hard a judge may try to be fair to contributors and non-contributors alike, the necessity and practicalities of the campaign fundraising can only create the public perception that judges will not be impartial.¹⁴

One need only read this well-reasoned report, which comes out of a distressing situation, to recognize the benefits of the merit selection system and the defects of an election system. The report concludes with the following recommendation:

The Special Commission on the Administration of Justice in Cook County recommends that associate and circuit judges of Circuit Courts and all justices of the Appellate Courts and the Supreme Court be selected by a system in which a nominating commission recommends a list of judicial candidates from which the Governor must appoint the judges. Sitting judges would remain in office but be subject to new retention provisions when their terms of office expire. . . . We believe that the adoption of our recommendations would result in more highly qualified judges and greater judicial independence.¹⁵

The only knowledgeable opponents of that report could be individuals who either wish to have less qualified judges or wish to inhibit judicial independence. Yet, qualified, independent judges are critical to a quality judicial system.

The notion of the importance of the independence of the judiciary is not new. It has been recognized by everyone who has examined the system throughout the years. The noted Frenchman, Alexis de Tocqueville, writing in his now famous *Democracy in America*, recognized it in 1831 when he traveled what was then the whole of the United States. "Confederations have existed in other countries beside America; and have not been established on the shores of the New World alone: the representative system of government has been adopted in several states of Europe; but I am not aware that any nation of the globe has hitherto organized a judicial power on the principle adopted by the Americans."¹⁶ He describes this independence of the judiciary and its right to declare a law invalid if contrary to the constitu-

14. *Id.* at 1-3.

15. *Id.* at 5.

16. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 101 (4th ed. Philadelphia 1841).

tion of the jurisdiction. The importance of that independence was further stressed by former United States Supreme Court Justice Owen Roberts when he said,

When a man goes on the Court he ought not to have to depend upon the strength . . . of his own character to resist the temptation to shade a sentence in an opinion or to shade a view. [He should not have] to put an umbrella up in case it should rain. He ought to be free to say his say, knowing, as the founding fathers meant he should know, that nothing could reach him and that his conscience was as free as could be.¹⁷

What was it the founding fathers intended? Alexander Hamilton, writing in *The Federalist*, said:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.¹⁸

Those who argue that judges should be popularly elected and, as a result, subject to the will of the majority, fail to recognize that such a result would be contrary to the purpose of an independent judiciary. If the goals of a state judicial system are to attract and keep highly qualified individuals who will impartially render justice and who will not succumb to the will of the majority if that will is contrary to the law, then that jurisdiction must embrace a form of merit selection for its judiciary. Nothing else in present society can so quickly assure that result.

17. Raven, *Does the Bar Have an Obligation to Help Ensure the Independence of the Judiciary?*, 69 JUDICATURE 66, 67 (1985) (quoting Justice Roberts).

18. THE FEDERALIST No. 78, at 524 (A. Hamilton) (J. Cooke ed. 1961).