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NONPARTISAN ELECTION OF JUDGES: THE MICHIGAN CASE

by

Thomas E. Brennan

TOO often, the American Bar Association, the American Judicature Society, and many state bar organizations have focused on merit selection of judges to the exclusion of other reforms. Sometimes, the efforts of these organizations have been counterproductive. They have allowed the best, as they saw it, to be the enemy of the good. Poor methods, even bizarre methods, of choosing judges have been perpetuated because bar leaders feared that improving existing practices would stifle their hopes for some ultimate, ideal selection process.

Trends in American politics are affecting the way we choose our judges. Most of the states that still elect judges in partisan elections are located in the South. This is perhaps because, for all practical purposes, Democratic Party nomination in most southern states has been tantamount to election, and the Democratic primary thus has functioned as a nonpartisan election. The so-called Reagan revolution, however, is creating a two-party system in much of the South.

Michigan faced a similar threat to judicial stability fifty years ago as a result of the Roosevelt revolution. Before the New Deal, Michigan had partisan election of judges just as Texas has today. One morning in 1936, the Republican judges in Detroit woke up to find their jobs in serious jeopardy of being taken over by a horde of Democrats with strange-sounding Polish, Italian, and Irish names. They promptly initiated the movement for a nonpartisan judiciary, and by 1939 they had amended the Michigan constitution to require nonpartisan nomination and election of judges.

The Michigan amendment had only one exception: the nomination of supreme court justices was left to political party conventions. Each party nominates candidates to run on a nonpartisan ballot against each other. This practice is being challenged in Michigan today.

There has been one useful purpose served by Michigan's fifty-year experience with a nonpartisan elective method of choosing judges in which one court continued to be nominated by partisan political conventions. The experience has provided a controlled experiment from which certain conclusions about the two systems can be drawn.

The primary conclusion is that nonpartisan elections are far superior to partisan election. Partisanship is a notion clearly at odds with impartiality,

and impartiality is the goal of the judiciary. There is no place for party discipline or party loyalty in the courts.

Moreover, partisanship is at odds with the central purpose of a proper method of judicial selection and tenure. Any good system of judicial selection and tenure must have three principle objectives: (1) to attract and retain the best qualified people on the bench; (2) to remove unqualified judges; and (3) to maintain the confidence of the community in the judicial system. The experience in Michigan suggests that the political parties always fill the ticket. They always find a candidate to oppose an incumbent of the other party. Even when the incumbent is fair-minded and qualified, the party opposes him because he is not "one of us." Many qualified incumbents have been defeated in their reelection bids by candidates whose principle qualification was loyalty to a different political party. In the last twenty years, six members of the Michigan Supreme Court have been defeated at the polls. Two were former chief justices. These six justices had nearly fifty years of combined judicial experience. It has been an awful waste.

Partisan election of judges is bad. It has survived only in those states that have not enjoyed vigorous two-party politics. Partisan elections may disappear from the American scene rather soon, especially in light of *Storer v. Brown* and similar cases, which are breaking the partisan stranglehold on American politics generally.

But if partisan judicial elections are bad, nonpartisan elections are good. To foster and maintain the confidence of the community in our courts, it is important that the public have a proprietary feeling about the judicial system. Other cultures can accept a justice system administered by their elders, hereditary Levites, or monarchial appointees; but in America, community confidence requires a perception that courts are of the people, by the people, and for the people.

Access and participation must exist at two levels. First, citizens must feel welcome to use the courts as litigants and to participate in the work of the courts as jurors, witnesses, and attorneys. Second, there must also be open, public access to judicial careers by those who legitimately aspire to be judges, and a commonly accepted public participation in the process of choosing, retaining, and removing judges. For this reason, American judges should be elected, as they are in one way or another in three quarters of the states of our union.

Where judicial elections are nonpartisan, there is no unseemly turnover of judges. During the same period in Michigan when the party-nominated supreme court justices were in a revolving door of election and defeat, no incumbent judge of Michigan's nonpartisan intermediate court of appeals was defeated. In fact, twenty of twenty-seven reelections in that court have been uncontested. No incumbent has ever been required to compete in a primary election, and only new appointees have had serious opposition.

In a very real sense, every system of judicial selection begins with a lawyer's aspiration to become a judge. The ethics of our profession tell us that a

lawyer's ambition to judicial office should be governed by an objective assessment of his or her capacity to add honor to the bench.

The Michigan experience is that lawyers are, by and large, faithful to those ideals. Moreover, the practical realities of getting elected reinforce that ethical standard. If a judge is doing a good job and enjoys the confidence of the community, the bar will leave him alone. In a nonpartisan elective system, he will be unopposed and have no need to campaign, raise money, or go out on the stump.

On the other hand, the Michigan experience has been that in nonpartisan elected circuit and district courts, when a judge loses the confidence of the community, he also loses the confidence of members of the bar. Opposition will surface. Judges who should be defeated are defeated. This has happened over and over again.

The process known as retention election has nothing to do with judicial selection. It relates only to judicial tenure. Thus, retention election does not relate so much to attracting and retaining good judges as it does to removing bad ones.

In Michigan there are four methods of removing judges. First, a judge can be impeached. Second, a judge can be removed by the governor upon the recommendation of a concurrent resolution of two-thirds of the members of both houses of the legislature. Third, a judge can be removed by the supreme court upon the recommendation of the judicial tenure commission. Fourth, a judge can be defeated for reelection.

No judge in Michigan has ever been impeached. None have been removed by the governor or legislature. Very few have been ousted by the supreme court and the tenure commission. Many judges, however, have been retired by the voters. In contrast to the partisan blood-letting in the supreme court, the nonpartisan election defeats have reflected loss of community confidence based almost always upon diminished or controverted judicial ability and performance.

It is interesting that the one method of judicial removal that Michigan does not have is recall. All other elected officials in Michigan are subject to recall elections upon the petitions of a certain percentage of the voters. By constitution, our judges are exempt from that process.

The reason for this constitutional exemption is that a judge must often make unpopular decisions. He should not be called to account, out of due season, for the public acceptance of a particular ruling or opinion. It is better and safer to judge the judges only in the regular election cycle when their total record can be considered in better focus. Moreover, the recall of a judge is essentially a negative campaign. It is marked by criticism, invectives, charges of misfeasance, and other negative accusations. There is no way to oust a judge in a public recall campaign without spilling a great deal of those negative public sentiments on the judicial office itself.

In Michigan, as elsewhere, public confidence in and respect for public office holders is never lower than in the midst of a recall campaign. It is difficult to see how the confidence and respect of the community can be

maintained on a high level by courts whose judges are the subject of contested retention elections. Even when a judge wins a contested retention election, the aroma of criticism remains. Even if only one-third of the citizens are on record as believing that Judge A is lazy, intemperate, and rude, isn't the judicial system injured? Is Judge A really vindicated, or will he be more likely to be vindictive? And when is a retention election ever uncontested? Every elected official is well-advised to run scared. Is the severity of an incumbent's paranoia the proper measure of his reelection effort?

In a nonpartisan election system, good judges are usually unopposed. In Michigan unopposed judicial candidates must return campaign funds that were raised before the filing date, and they may not raise any more. Everybody gets a free ride. How is that possible in a retention election system? Some judges harbor nightmares of negative newspaper editorials appearing on the day before the election. Can they ever be sure that no positive image-building is necessary? It was suggested in Illinois that a judge who loses a retention election be barred from holding any public office for at least ten years. Nonretention is seen as a disgrace, a rejection. Defeat in a contested nonpartisan election leaves the former judge his honor and self-respect at least. Furthermore, it is much easier to protect public esteem for the courts if the newspaper editorial can endorse candidate B and comment on his reputation for scholarship, punctuality, temperance, and courtesy, instead of attacking Judge A because he is dumb, late, drunk, and rude.

On the whole, a system that allows for both contested and uncontested nonpartisan reelection of judges is better than the "yes" or "no" retention elections that have been tried by many states over the last several decades. Nonpartisan election and reelection, however, is not only a good way to get rid of bad judges; it is also a good way to put judges on the bench in the first place. In Michigan, there is a dual method of original selection. Because the governor has the power to fill judicial vacancies, many judges come to the bench in the first instance by gubernatorial appointment. On the other hand, when new judgeships are created, when judges retire at the end of their term of office, and when incumbents are replaced by the voters, there are opportunities for judicial aspirants to be elected in the first instance. This is especially common in the lower courts.

What kind of judges do the people elect? Putting it another way, what kind of people get to be judges in an elective system, as opposed, for example, to federal judges, who are appointed for life? Two years ago a study of the trial courts of general jurisdiction in Wayne County, Michigan revealed some interesting comparisons between those who are selected for appointive judgeships and those who are either elected or appointed to elective judgeships.

At the time of the study, there were fifteen federal district court judges in the Eastern District of Michigan. They, of course, were all appointed. The following facts illustrate their demographics. There were fourteen males and one female. The group included nine white Anglo-Saxon Protestants, two Catholics, two Jews, and two blacks. Nine of the federal judges in Detroit

attended the University of Michigan Law School. There was one judge from each of the following law schools: University of Detroit, Wayne State University, Detroit College of Law, Georgetown, Yale, and the University of Iowa. The average age of the federal judges was 62.6 years.¹ Only four of the judges had previous judicial experience. Two of these four had first come to judicial office by election.

The state trial courts of general civil and criminal jurisdiction in Wayne County are the circuit and recorders courts. Together, they consisted of sixty-three judges, of whom fifty-one were male and twelve were female. There were only five white Anglo-Saxon Protestants on the circuit and recorders benches.² There were thirty-one Catholics, seven Jews, and twenty-one black judges.³ Law schools represented were the University of Detroit (25), Wayne State University (16), Detroit College of Law (14), and one judge each from DePaul, Notre Dame, University of Pennsylvania, and New York University. Only four of the sixty-three state court judges graduated from the University of Michigan.⁴ The average age of circuit and recorders judges was fifty years, fully ten years younger than their counterparts on the federal bench. Forty-nine percent of the state judges had some previous judicial experience, whereas only twenty-seven percent of the appointed federal judges had such experience. Thirty-four of the state court judges, or fifty-four percent, first achieved judicial office by way of election. Twenty-nine judges, or forty-six percent, were originally appointed by the governor to fill a vacancy.

The results of this survey suggest the following conclusions. In Detroit the elective system is more open to women and minorities. It produces a bench that more nearly reflects the ethnic mix in the community. The elective system produces a younger bench and one that is more likely to be filled by younger, career jurists who move up the ladder from lower courts, rather than older lawyers who enter the judiciary at a higher level directly from the law practice.

The survey also raises two interesting and perhaps troubling questions: are white Anglo-Saxon Protestant graduates of the University of Michigan over-represented on the appointive federal district court, or are they under-represented on the elective state courts? The answer to both questions may be "yes." As stated above, the process of judicial selection always begins in the heart and mind of the judicial aspirant. A lawyer decides that he or she wants to be a judge. By and large, most lawyers who aspire to be judges are well motivated and at the outset, at least, rather idealistic about the judicial role. The fact is, however, that being a judge is a job, a way to make a living. Furthermore, judicial service is not as attractive a career option for a lawyer

1. If the two senior judges are not included, the average would still be 60 years.

2. Thus, white Anglo-Saxon Protestants comprised 60 percent of the federal appointees, but only eight percent of the state court judges.

3. The sum of the ethnic figures for state judges is 64 rather than 63 because one of the black judges was also Catholic.

4. Thus, University of Michigan Law School graduates occupied 60 percent of the appointed federal positions, but only six percent of the state court positions.

who graduates with good grades from a prestige law school as it is for a graduate of a so-called local law school.

It should come as no surprise that there is an ugly caste system in American legal education. Graduates of certain law schools are welcomed into big, prestige law firms that pay good salaries. These firms represent big, prestige clients who pay large fees and expect their lawyers to be smarter than the judges before whom they appear. Fortunately for America, the clients very often do not get their money's worth. The elitist presumption that selects seventy-five percent of the law clerks in the United States Supreme Court from only eight of the 175 A.B.A.-approved law schools is grievously in error.

To the extent that this same elitist mentality fosters efforts of the organized bar to change the method of judicial selection to so-called "merit" selection, it is also misplaced. A judiciary should reflect the diversity of people, not because judges represent people in the legislative sense, but because the wisdom and experience of the whole people must be brought to bear upon the constantly expanding area of judicial decisions. In order to enjoy the confidence of the community, the courts need more than high L.S.A.T. scores, good grade point averages, and diplomas from prestige universities. Judges must be perceived as caring, concerned, courageous, and compassionate. When it comes to human understanding, there is no substitute for personal experience. Only a black man or woman can know what America looks like from his or her perspective; only a Jew can appreciate the common feeling of other Jews living in a predominantly Christian culture. No man can fully understand or faithfully reflect a woman's point of view. People instinctively know these things. The tradition that dictates that a citizen be tried before a jury of his peers, drawn from the vicinage, commands that judges have similar credentials.

The evils often cited as endemic to the election of judges are frequently exaggerated. A typical complaint is that people do not know the candidates for whom they are voting. The fact that citizens randomly stopped at the supermarket cannot name their local judges, however, is hardly a valid test. They probably cannot name legislators or school board members either. College students will tell you that a surprise quiz is unfair. They will prepare before the examination. Thomas Jefferson said that if the voters make unwise or foolish choices, the remedy is not to disenfranchise them, but to inform their discretion. To say that voters do not know what they are doing is a glib denigration of democracy. Voters who do their homework do know the candidates for whom they are voting, and they are jealous of their electoral prerogative. Moreover, those informed and knowledgeable people are the community leaders. They are the very people who need to be enlisted in any effort to change the system from election to appointment.

In order to disenfranchise the indifferent, the apathetic, and the uninformed, it is also necessary to disenfranchise the responsible and the interested, and to engender their enthusiastic support. This is not very easy to do. For this reason, every time a merit selection system has been proposed

in Michigan, it has either failed to get on the ballot, or it has been defeated by the voters. The people of Michigan like to elect their judges, they want to elect their judges, and they will elect their judges for the foreseeable future. And the people of Michigan are not alone. In fact, the only places where state judges do not appear on the ballot in America are in New England and along the Eastern Seaboard. In three of those states, Connecticut, Virginia, and South Carolina, the legislature appoints judges.

It is time to recognize that election is going to continue to be an integral part of the American process of judicial selection and tenure. Consequently, we should take the position that the elective process should be made as effective as possible to achieve the three goals of any system of judicial selection and tenure: attraction and retention of good judges; removal of bad judges; and maintenance of community confidence. The following standards for judicial elections are proposed to meet these goals:

- (1) All judicial elections should be nonpartisan;
- (2) Incumbent judges should be identified on the ballot as incumbents;
- (3) Nominations should be by open, nonpartisan primary elections;
- (4) A substantial number of petition signatures should be required for a nonincumbent to obtain a position on the primary ballot;
- (5) Incumbent judges should be allowed to file by affidavit without petitions;
- (6) Each judgeship should be separately voted upon;
- (7) No more than two candidates should appear on the general election ballot for each judicial seat;
- (8) If a candidate is unopposed, he or she should not be allowed to campaign.

Of course, there may be other standards that might be considered to improve the elective process.

Beyond legislative enactments, involvement and commitment by the legal profession in the whole enterprise of recruiting, selecting, and retaining good judges as well as removing bad ones is crucial to any method of judicial selection. Lawyers too often say, "Oh, everytime the bar association endorses a candidate, the other fellow wins the election," or "It takes a million dollars to get elected statewide. It's all controlled by special interests and rich people who buy T.V. commercials." I am troubled by comments like these from lawyers who ought to have more confidence in democracy and a deeper commitment to republican ideals.

Around the world, the process of self-government is in jeopardy. In South America, the Middle East, the Philippines, Africa, and southeast Asia, our planet festers with places where the will of the majority of the people is frustrated by gunfire and where the exercise of the franchise is a matter of life and death. Lawyers, of all people, ought to understand that there is no easy substitute for self-government and that justice and freedom, law and liberty, cannot long endure without democracy. It behooves the lawyers of the nation to take the lead and to revive the once universal hope that government of the people, by the people, and for the people shall not perish from this Earth.

