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The Simon Review

Selecting Judges: Merit Selection and Other Matters

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## Foreword

The Paul Simon Public Policy Institute is pleased to publish this paper from Dr. Stephen L. Wasby who is Professor of Political Science Emeritus at the University at Albany-SUNY. Steve, who is a former Professor of Political Science at Southern Illinois University Carbondale, is a nationally recognized expert in the field of constitutional law and judicial processes. In this paper he surveys the various plans for selecting judges utilized by the fifty states. These plans break down broadly into elective versus appointive systems with those who use elections further distinguished by partisan versus non-partisan elections. The most popular plan is the Merit Selection or “Missouri Plan” which originated in our neighboring state. This plan has received much attention lately and it is the one most directly addressed in Wasby’s paper.

In Illinois we use a unique combination of the plans used in other states. Judges in Illinois are first selected through partisan primaries and general elections (although many are initially appointed to an open seat and temporarily hold the position which they subsequently seek by election). The judge who is elected in a partisan contest then must later seek retention to the same position in a subsequent election by “running on his or her record”. They thus do not face another partisan opponent in those retention contests. The retention election is a component of the widely touted Merit Selection Plan which many reformers believe would be a better system for Illinois. The elections for judge have become highly competitive and highly polarized along partisan lines in Illinois. Perhaps the most famous example, and one which has garnered national attention, was the hard fought and deeply divisive 2004 contest between Republican Lloyd A. Karmeier and Democrat Gordon E. Maag to represent the fifth judicial district on the Illinois Supreme Court. This race, which Justice Karmeier ultimately won, consumed almost \$10 million in campaign donations. The fact that many of these donations, on both sides, came from individuals and interest groups likely to have business before the court, drew much criticism and increased the public’s already jaundiced view of how politics is done in the Prairie State. It also increased interest among many reformers in changing the system, perhaps to a merit plan.

Professor Wasby discusses the challenges of having judges compete in elections versus having them appointed to office, which usually means appointment by the governor and a merit selection commission. The laudable objectives of democratic accountability and judicial independence are counterpoised against each other. It is hard to achieve one without giving up something on the other objective. This dilemma is embedded in any selection system a state may adopt. Unfortunately there is no single system which clearly optimizes the best mixture of these two highly desirable objectives as Wasby explains.

This paper is offered by the Paul Simon Public Policy Institute as a part of our continuing series formerly called, “The Occasional Papers”, which are written by academics who are experts in their fields. These authors try to glean from the academic knowledge base in their disciplines information which is relevant to the public policy debates taking place in the state and nation.

The Wasby paper is the first one under our new series title, The Simon Review. It is one which we think Paul Simon would have been proud to present.

John S. Jackson  
Series Editor  
November 2009

“Selecting Judges: Merit Selection and Other Matters”\*

Stephen L. Wasby\*\*

It has been suggested that a public policy topic that is timely and needs to be addressed is the selection of state judges. The timeliness is clear, given controversy in Illinois about the amount of money spent in a recent judicial election and the U.S. Supreme Court’s response to a comparable situation in West Virginia. However, the matter of selecting judges and issues related to that topic is not limited to those two states but extends not only to other states which elect judges, particularly of their high courts, but to states which have, perhaps without much thought, adopted the so-called “merit system” of judicial selection.

After some further introductory comments, various means of selecting judges will be delineated to provide context. Then some broad questions will be raised although complete answers to them will not be provided. The focus will turn to aspects of selection by the “merit system,” which has attracted particular attention in Illinois, as elsewhere, as a possible replacement for election of judges. Basically, the merit involves having a selection commission – composed of lawyers and sometimes laypersons, appointed by the governor and the bar, and serving for staggered terms– compose a list of possible appointees; the governor must appoint from that list; and, after the appointee has served for a designated period of time, usually at least

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a year, that judge stands for retention (“Shall Judge X be retained in office?”)

Perhaps because of long work on the federal judicial system, where judges are appointed, my bias has been toward methods of selection that involve appointment. However, I am also a skeptic and a contrarian, and it is in the spirit of the Simon Institute that questions should be raised about what too many people too readily accept as a preferred reform.

I. Unless we want to be people with an answer seeking a question, we must specify the *perceived* problem. It is the election of state judges and, more particularly, increased contests in such elections, based on decisions that sitting judges have made, with large amounts of money being spent and with that money thought to play a substantial role in decisions. Here it should be pointed out that increased attention and money has been given to state high courts, with both trial courts and the largely invisible state intermediate appellate courts *less* of an issue. It should also be noted that most states have adopted intermediate appellate courts, which, with mandatory jurisdiction, resolve the appeals in routine cases, so that state high courts then become more like the U.S. Supreme Court in being “certiorari” (discretionary jurisdiction) courts, able to select the cases they think most important, in addition to being the place to which election contests and death penalty cases are automatically sent.

Increased contests for high judicial office are said to have produced a money race and to have increased the influence of money or certainly its potential influence. The facts underlying the Supreme Court’s ruling in *Capperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009), can be treated as the basic poster for the situation. A \$50 million judgment was awarded by a West Virginia state trial court against Massey Coal for fraudulent misrepresentation and tortious interference with contractual relations. With elections to the West Virginia Supreme Court of

Appeals in the offing, Massey's chair/president/CEO supported Brent Benjamin for a position on the court, in opposition to incumbent Justice McGraw, and Massey contributed not only the \$1,000 statutory maximum to Benjamin's campaign committee –peanuts, and hardly worth our attention– but also \$500K in “independent expenditures” (for direct mailings and media advertising) and \$2.5M to a Section 527 political organization which opposed McGraw and supported Benjamin. The Massey contributions were two-thirds of the organization's funds and the \$3M dwarfed other amounts contributed by Benjamin's supporters and Benjamin's own committee. It may be no surprise, then, that, aided by some missteps by incumbent Justice McGraw, Benjamin won (by 53.3%-46.7%). Or that new Justice Benjamin was in the 3-2 majority that reversed the verdict against Massey. Or that Justice Benjamin refused to recuse (withdraw from the case), and with two of the other justices recused, Benjamin, as acting chief justice, chose two replacement judges, and that on rehearing the result was the same.

Faced with this situation, the U.S. Supreme Court granted review –remember, the justices of our nation's highest court decide only about seventy cases a year out of 8,000 petitions for review– and reversed. But they did so by a vote of only 5-4, with Justice Kennedy writing for the Court and Chief Justice Roberts along with Justices Scalia, Thomas, and Alito dissenting. Using so-called “objective” standards (meaning how matters would look to a neutral observer), the majority found that “there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.” (Id., at 2265) What Justice Kennedy's opinion means continues to be a subject of some debate. It was hedged about by references to “an extraordinary situation” and “extreme cases,” and the Chief Justice's dissent was a combination of complaints about the lack of guidelines about when recusal would be required and a litany of questions the majority had

left unanswered. (One quick response to that point is that after handing down a ruling in a “lead” case, the Court often waits for later cases to be brought to flesh out the meaning of the “lead” case.)

Perhaps money does make a difference, perhaps it does not; certainly the justices of the U.S. Supreme Court disagreed as to that empirical matter in the West Virginia race. While now receiving more attention, the linkage between contributions to judicial campaigns and judges’ votes in cases has not been persuasively established. Perhaps some players –whether they be insurance or trial lawyers– are trying to buy elections because cases important to them will be on the docket. *But* perhaps contributions are made because donors –including lawyers– are committed to retaining judicial competence: Lest you scoff, sometimes a cigar is just a cigar, and lawyers who practice before the courts want competent, fair judges because they know someone who will tilt toward them in one case may well tilt unfairly toward an opponent in another. And perhaps money simply *follows* the donors’ inclinations rather than causing judges to vote a certain way. After all, it is basic social science that a correlation (in this instance, between contributions and votes) is not causation.

One should add that, with the linkage between money and votes not resolved for the legislature, it is difficult to resolve it for judicial elections, where the issue is more recent. And here one would have to ask whether buying a legislative vote, if that is what a contribution to a legislative candidate does, is “less bad” than buying a judicial vote? We seem to think so, but vague sentiments aren’t enough to resolve important public policy issues. In addition, we have not managed to stop campaign contributions to legislators, as each new campaign finance “reform” seems to have more loopholes and places through which to drive Mack trucks, so one is

faced with comparable difficulties in making arguments about stopping them for judges. If one asks whether the perceived problem can be resolved either by limiting campaign contributions or by providing public funding of such campaigns, the answer is “probably no better than with executive and legislative races.”

And, as the U.S. Supreme Court required recusal in *Capperton v. Massey*, one might ask whether one can resolve the matter by leaving judicial elections and campaign finances in place but requiring recusal. The problem here is that judges are those who decide on their own recusal, at least in the first instance, doing so if they search their own consciences, and then if lawyers request them to do so, which is a risky matter for lawyers who must appear there again. If they decline to recuse and continue to sit on a case, the parties must wait for completion of the case and must lose it to use judicial bias as the basis for an appeal. (Requests for mandamus to a higher court to force out a judge are disfavored as disrupting trials.) And if it is a judge of a state high court whose participation is at issue, as it was in West Virginia, the only further appeal in the judicial system is to the U.S. Supreme Court, which will take only exceptional cases – like the West Virginia situation.

As to whether recusal would suffice to cure the problem, we must recognize that judicial arrogance is indeed an important part of the problem. Many judges routinely recuse after checking lists of parties and attorneys before them, and we hear nothing about it because they aren't required to state reasons. However, some judges –including Justice Scalia, who took his lead from the late Chief Justice Rehnquist– don't understand that people do see the appearance of impropriety and that the judges' continuing to sit doesn't pass the “sour taste test.” In short, relying on the judicial system to police itself is a chancy proposition. *Capperton v. Massey* is

instructive. After the West Virginia high court's initial ruling, recusal of three justices was sought on rehearing, with pictures surfacing of one justice (not the Massey-supported Benjamin) having vacationed with a member of the court. That justice –who, surprise, surprise, had supported Massey–*did* recuse, as did a justice on the other side who had criticized Justice Benjamin's position. But remember that Justice Benjamin, the electoral beneficiary of all the money, did not recuse.

II. After this discussion of a perceived problem, a delineation of the means of judicial selection is in order. In the federal system, Supreme Court justices and U.S. court of appeals and district court judges are appointed – nominated by the president and confirmed (eventually, in almost all cases) by the Senate. Just less than a quarter of the states (12) use *direct appointment*, although some of those require confirmation by the Senate or a body like a governor's council. The appointive states are, except for Hawaii, all in the East (mostly in the Northeast). Some states once used *legislative election* of judges, but in at least one of those states (Rhode Island), some of those justices who had themselves been legislators kept acting in a legislative fashion while on the court and ended up in ethical difficulty – which led to altering the selection plan. Of the remaining states, half elect their judges and half use the merit system, at least for the state's highest court. Of the twenty-two using election, in fifteen the judicial elections are nonpartisan, while they are partisan in seven. A number of states use different methods of selection for the state high court and for the lower courts; for example, judges of New York's Court of Appeals (the high court) are chosen by the merit system, while those on that state's trial court of general jurisdiction (oddly, named the Supreme Court) are elected. And in Missouri, where the merit system started, it initially was used only for the state supreme court and for the trial courts in St.

Louis and in Jackson County (Kansas City).

III. In a consideration of judicial selection, some large questions should be asked. The first is, *“How much democracy do we want in judicial selection?”* A somewhat different way of putting the matter is to ask, *“Do you want selection of judges to be like, or different from, the selection of legislators?”* Another, and related, question is *“Where do you want the politics in judicial selection?”* Because all support not only motherhood and apple pie but also support “judicial independence,” another question that must be answered is, *“How do we best achieve judicial independence?”* And still another question, to be taken into account in developing selection systems, is *“Should the judiciary be representative of the population?”*

On the last of these, the argument is usually that “diversity” of the judiciary increases the judiciary’s legitimacy, because a racially and gender diverse bench leads women and racial or ethnic minorities not to believe “someone else” is making decisions affecting them. In the federal system, Presidents Carter and Clinton focused on diversity –more than on ideology (particularly true for Clinton)– and the Presidents Bush did a better job than their Republican predecessors in that regard, at least as to women. There has, however, been little attention to this matter at the state level, although the number of female judges has increased and there have been some instances of majority-female state high courts, including Minnesota as the first, four women, two white males, and Alan Page, the former pro football player. One might ask the extent to which a selection method produces diversity. Diversity is *not* inconsistent with merit – any more than patronage and merit are necessarily inconsistent: If there are two equally meritorious candidates for a position, selecting from one’s own party isn’t all bad.

Judicial independence is not my focus here, but some matters might be mentioned briefly.

By judicial independence is generally meant a situation that makes it possible for judges to be fair and impartial in the individual case—that is, decisions free of bias and a lack of untoward pressure on judges— and a lack of executive and legislative interference in the judiciary’s work, which means relative autonomy for the judiciary in development of its budget and provisions against reduction in judicial salary while in office. How to mesh modes of selection with judicial independence is a difficult matter and that almost all who advocate particular modes of selection tout them as aiding judicial independence. This happens even in the Canadian model, in which the Prime Minister announces the decision out of the blue, as if politics haven’t affected the decision. Some advocates do, however, stress judicial accountability over independence.

As to each of the other questions:

(1) From time to time, we hear support for popular accountability of judges, particularly through election; this is, we are told, “the democratic way.” Yet we have regularly acted to limit the amount of democratic action. In formally elective systems, we find that judges leave the court before the end of their term, with their positions filled by appointment, so that the next election features an incumbent. This gaming of the system has been widespread. In one state, for example, no judge reached the state’s high court by its nonpartisan election mechanism for over twenty years, and that string was broken only because some judge had to serve his whole term to vest his pension. In that same state, judges who would reach mandatory retirement several months after the beginning of a new term would nonetheless run for reelection and be endorsed by the bar and the newspapers, an indication of what might call elite “connivance,” only to retire shortly after being reelected, with the governor choosing their successors. In other situations, we would call that a “fraud upon the public.” We also find that when there is a formal election

system, parties may cross-endorse each other's candidates, leaving elections non-competitive. Or, believing that "politics" should be removed from judicial elections, we make judicial elections non-partisan, so that, with the party cue removed, electoral turnout is reduced, and it is reduced further when judicial elections are not held at the time of the biennial general election. I would add that non-elective systems can also be undercut, as when, in the selection of federal judges, which requires the Senate's advice and consent, a president makes a recess appointment to the judiciary, thus thwarting the participation of publicly-elected officials.

(2) Political scientists Chris Bonneau and Melinda Gann have recently argued, in *In Defense of Judicial Elections* (Routledge, 2009) that elections are valid means of selecting judges because judges are like any other government officials in the way they behave. (A contrary and well-stated different view, by Gerald Leonard, is that "Political as judging must often or always be, there is something distinctive and meaningful about the activities of judges relative to those of legislators and executive officers . . ." ) Bonneau and Hall do a good job of debunking reformers' pretensions. For example, they argue effectively that reforms may produce exactly that about which the reformers complain – for example, nonpartisan elections produce low turnout and higher campaign expenses because the candidates are not known. However, their case *for* judicial elections is not as strong. Indeed, there has been an increase in contested elections, particularly for open seats (those with no incumbent), and there has also been the same dynamic as in legislative elections, with vigorous contestation of open seats and where incumbents perhaps vulnerable because of an unpopular decision attract challengers and an incumbent must lock up the money to preclude challenges, although, again as with legislative elections, incumbents receive more contributions. A problem with Bonneau and Hall's argument

is that their focus is almost entirely on selection to state high courts and on high-profile/hot-button cases. It is indeed with such cases that, just as at the U.S. Supreme Court, with vague constitutional provisions to be interpreted and imprecise precedents to be applied, we are most likely to see the effects of ideology on judges' decisions. If instead we look at state intermediate appellate courts –like the Illinois Court of Appeals– to which most appeals go and at which most conclude, we find little disagreement and (thus) less effect of ideology. Yet if we are to talk about the effect of the method of selecting judges, we should be concerned about all levels of courts, not just state high courts.

IV. After this extended prologue, it is time to turn more directly to an examination of the realities of the merit system. The largest problem, in my view, is that it is oversold. It may be an improvement, in some respects, over relevant aspects of judicial election, but it is not a “silver bullet” – certainly not the one that some advocates seem to make it out to be. What are some of the problems?

§ We are told that the public gets to play a role. But how? In retention elections. But they don't come until after a person has been placed on the bench by an appointment process (the governor's choice from a list prepared by others, who are selected in a low-visibility manner) and the judge has served for some designated period of time. And then the judge runs unopposed without even the aid of a partisan label, which does aid voters. Even when a super-majority (often 60 percent) is required for retention, few judges are ever removed. So to speak of the “merit” system as democratic comes close to being a farce, and it somewhat puzzling that groups like the League of Women *Voters* support it, as they are supporting a selection method which limits, not encourages, voter participation.

In short, the merit system may have redeeming features, but public participation is not one of them.

§ The merit system seems to be the “pet project” of community elites, including newspaper editors and lawyers’ bar associations. Certainly groups try to have privileged status in any selection process, and one can see this when bar associations get to select members of the judicial nominating commissions, just as one can see it in federal appointment of judges, where the American Bar Association long had the privileged position of getting to see and “vet” potential nominees.

§ Politics are there, behind the scenes. Those politics play out in terms of who vets the nominees; and if there is a screening/nominating commission, groups bring their pressure there, again out of sight. There is the substitution of bar politics –a continuing of the dispute between “trial lawyer” (personal injury lawyers) and insurance defense lawyers– for partisan politics. But partisan politics can still intervene. In Missouri, where the merit system started –indeed, it was long known as the “Missouri Plan”– the selection commission, which had to provide the governor with three names, would select one nominee from the “off” party (i.e., a Republican if there were a Democrat governor), one person from the governor’s party but from another faction of that party, and only one that the governor was likely to select. Who made the selection? In reality, the commission did, not the governor. The leading study of the “Missouri plan” –*The Politics of the Bench and Bar*, by Richard Watson, Ronald Downing, and Frederick Spiegel (1969), has long been ignored despite what it tells us about the actual operation of the system.

§ Lists provided to the governor often exclude important segments of the community, such as women, African-Americans, Hispanics, or ethnic groups like Italian-Americans. If the list is

only advisory, the governor can “cure” the defect, but in the standard merit system, the governor *must* select from the list. The governor could reject it and ask for another, but the selection commission can stand pat, and most do.

§ One gets the substitution of bar politics for other types of politics, as noted above. Politics will not go away because one takes political parties out of the picture. Even the “best” judicial selection commission can’t avoid politics. See this statement, made in the context of a discussion about the South African Judicial Selection Commission: “The involvement of a judicial selection commission, even one which...has a membership carefully designed to represent the interest of different groups and follows a transparent procedure, does not eliminate controversy and suspicions that professional accomplishment plays second fiddle to political interests.”

As this discussion may suggest, the debate over the balance of political and legal (merit) factors is unending.

V. There is one other matter that should be noted, because it bears on any discussion as to whether judicial elections should be continued or replaced with some other method of selection. That is the movement, in the name of freedom of speech, to remove limits on what candidates for judicial office may say when seeking office or retention in office. This certainly bears on the question of judicial independence, because a judge who promises to adopt a particular stance is likely to be less independent than one who does not – although we must keep in mind that, as the charade known as the Sotomayor hearings indicates, as did the Roberts and Alito hearings before them, that statements about “only deciding based on the law” not only fly in the face of strong social science evidence to the contrary, particularly in discretionary jurisdiction highest courts,

but also are falsehoods perpetrated –and perpetuated– in the effort to achieve confirmation.

One of the most important developments with respect to judicial elections, and indeed a major development in First Amendment law, is the use of the doctrine of freedom of speech to attack restrictions, embodied in codes of judicial conduct and ethics, on what candidates for judicial office may say, such as those provisions prohibiting judicial candidates from “announcing views on disputed legal or political issues.” Although the U.S. Supreme Court has not reached the related provisions precluding judicial promises as to decisions, a majority of the Court, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), did strike down judicial conduct provisions prohibiting a judge or judicial candidate announcing positions on policy issues. The attack on these provisions has continued and expanded after *White* and has led to considerable litigation, with cases argued most notably by James Bopp, a leading conservative public interest litigator. With the “announce clause” invalidated, the next provisions to be attacked are those which prevent judges from making pledges, promises, or commitments, and litigation concerning those provisions occurs most frequently in the context of interest groups wanting judicial candidates to complete questionnaires. There have been a number of post-*White* rulings, such as those in which courts have struck down bans on judges’ soliciting campaign contributions – and saying that requiring that they do so through a committee doesn’t resolve the problem of judges knowing the identity of contributors.

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*Concluding Thoughts.* As the purpose of this paper has been to *inform*, I do not offer much of a conclusion, much less a grand one. The information provided is, without question, informed by a skepticism about the claims of those who would substitute the “merit system,” as it has come to

be known, for elections. I hold no brief for judicial elections. Perhaps what I've heard about them for many years, their "down-side," has affected me –media coverage, which is not favorable to elections, may well have affected me. But it is one thing to be "not thrilled" by one mechanism for selecting judges, and another to fall fully into the arms of an alternative means. Perhaps it's just that I am a contrarian. I hope the questions raised here –the big ones noted at the beginning of my talk, and the "smaller" ones about particular selection systems– have piqued the reader's interest and stimulated thought.

#### Addendum

I call to your attention an extremely fine article by political scientist, G. Alan Tarr, "Do Retention Elections Work?" It appears at 74 Missouri Law Review 605-633 (Summer 2009). Tarr raises serious questions about assertions made by those who support retention elections, a crucial part of the "merit system" of judicial selection. SLW

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