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Why Popular Election Should Be Selected Over the Merit Plan Method of Judicial Selection

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by

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Introduction

> *"If we begin with the proposition that ours is a system of laws, not of men, we immediately confront the reality that the system is only as good as the men and women who administer it." (Escovitz 1)*

For most individuals, "justice" is defined by a decision of a judge in a courtroom. Whether it is through a personal experience at their local county courthouse or through a decision of the United States Supreme Court, the actions of the judge invariably shape the public's view of our country's legal system.

While the United States Constitution clearly outlines how federal judges are to be chosen in Article 2, Section 2, Paragraph 2, no indication is made as to the process in which the lower courts were to follow in deciding how state judges were to be selected. And therein lies the dilemma.

Presently, there are two methods for selecting judges: appointment and popular election. There are variations of both plans; and both plans have their supporters and their critics. While surveying the literature concerning judicial selection, however, it is disquieting to see how often the ultimate goals of both plans remain vague and elusive. Advocates of a particular position rarely attempt to track the implications and interrelations of various plans for selecting judges, filling interim vacanies,

retaining incumbents, length of terms, procedures for removal, or even the kind of job the public demands in the courtroom. Rather, a lot of theory and few facts usually characterize presentations abot the actual impact of alternative methods for filling judicial positions.

The goal, therefore, of this paper was to examine both methods and their variations; to look at the empirical and normative data which support and refute them; and to make a conclusion based thereupon. The facts, in my opinion, support the following conclusion:

Judicial selection through the process of popular election, while not a perfect instrument, provides a higher degree of accountability and achieves the same level of "independence" from political forces as the merit plan. Moreover, the popular election process is more consistent with the overlying theme of a participatory democracy dictated by the founding fathers and implemented by following generations.

Before we take a close look at the two systems, however, it is helpful to look at the previous history of how merit and elective methods of judicial selection were established in the United States.

History

Historically, there has been considerable controversy about how American judges should be chosen. Like most of our legal institutions, our methods for selecting judges have their roots in England. After the American Revolution, the original thirteen states reacted against the selection of judges by executive appointment and overwhelmingly chose methods of selection that did not reflect the English colonial practice (Ashman 8).

In eight states the power of appointment was vested in one or both houses of the legislature. Two states allowed appointment by the governor and his council. In only three states was the power of appointment vested in the governor, and even then the power was checked by the legislature. The new states were suspicious of the executive influence on the judiciary. They did not consider the populace fit to select its judicial officers. No state provided for a popularly elected judiciary (Berekson 3).

Unlike the wide variation in state methods for selecting judges, the federal process has remained quite stable. At the Constitutional Convention of 1787, Alexander Hamilton, proposed a method in which the President was granted authority to nominate and with the advice and consent of the Senate, to appoint justices of the supreme court (Ashman 10).

Beginning in the mid-1800's the appointment of state

judges by the executive or legislaute was drastically curtailed. The concept of an elected judiciary emerged during the Jacksonian era as part of a larger movement aimed at democratizing the political process in America. It was spearheaded by reformers who contended that the concept of an elitist judiciary did not square with the ideology of a government under popular control (Escovitz 13).

In 1832 Mississippi became the first state to elect all judges. By action of its constitutional convention in 1846, New York led the change from gubernatorial and legislative appointment to direct popular election. For the next century the 19 new states entering the Union, provided for an elected judiciary (Ashman 10).

Toward the end of the 19th century the results from popular election of the judiciary began to emerge. The Tammany Hall organization in New York epitomized the potential abuses of partisan judicial contests. Seizing control of the political processes that led to nomination, Tammany was able to run and elect its hand-picked and politically responsive slate of judicial candidates (Berkson 5).

Dissatisfaction and resentment of political party control of judicial candidates led to a counter-reform movement. Bar leaders attempted to control the power of political party organizations through a variety of devices, such as nonpartisan ballots, separate judicial nominating

conventions and elections, and direct primaries. They also attempted to increase the influence of the legal profession on judicial selection by conducting and publishing bar association referenda with respect to their recommendations on the fitness of candidates (Escovitz 13).

In an address before the American Bar Association, Roscoe E. Pound, a young law professor, noted that popular judicial elections were a major cause of public dissatisfaction with the administration of justice. In 1913, before the ABA, William Howard Taft, ex President, declared that even the nonpartisan judicial ballot was a failure. He asserted tat such a system permitted unqualified persons who were incapable even of political support to become elected through a vigorous campaign. In that same year the American Judicature Society was founded. Dedicated to promoting the efficient administration of justice the organization was particularly concerned with methods of selection, tenure,and retirement of judges (Escovitz 12).

Albert M. Kales, a law professor at Northwestern, and director of research for the American Judicature Society, set out to devise a method of judicial selection that would maximize the benefits and minimize the weaknesses of both the appointment and election processes. In essence, Kales sought to preserve the informed and intelligent choice which is the strong point of the appointive system while retaining ultimate voter control (Ashman 9).

The system devised by Kales and promoted by the American Judicature Society did combine appointments with election. It also added a very important third element- a judicial nominating commission. Under the Kales Plan, an elected chief justice would fill judicial vacancies from a list submitted by the commission which was expected to seek out the best available judicial talent. Once on the bench, these judges would thereafter go before the voters on the sole question of their retention (Ashman 10).

In 1926 Harold Laski, an English political scientist, proposed as a slight variation for the Kales Plan that the governor be substituted for the chief justice as the appointing agent. The Kales-Laski proposal contained the basic features upon which most subsequent plans for judicial reform have been based. The three part approach consisted of a) a judicial nominating commission to nominate candidates for the bench, b) an elected official, usually from the executive branch who would make his appointments from a list submitted by the commission, and c) subsequent nonpartisan and noncompetitive elections in which judges so chosen would run on their records (Ashman 11).

For nearly 25 years, the plan remained dormant and most states continued to elect their judges. In 1937, the American Bar Association endorsed the Kales-Laski proposal. Three years later it was voted into the constitution of Missouri and quickly became known as the "Missouri Plan"

The definition of "merit plan" that most scholars use when describing judicial selection is:

> *"a permanent nonpartisan commission of lawyers and non-lawyers that initially and independently generates, screens, and submits a list of judicial nominees to an official who is legally or voluntarily bound to make a decision from the list." (Ashman 12)*

One should be aware that there are other definitions of the "merit plan" when describing judicial selection. In fact, a large number of states and cities have adopted a variety of "merit plans", however for the sake of our discussion we will considered them to be true merit plans in that they meet part of the definition stated above.

The Merit Plan

In 1969, Watson and Downing of the University of Missouri undertook a comprehensive study of the origin, operation and consequences of the Missouri plan in that state, gathering data from the entire 25 years the plan had been in operation. Regarding the claim that the plan takes judicial selection out of politics they wrote.

> *"It is naive to suggest that the plan takes the politics out of judicial selection. Instead the plan is designed to bring to bear on the process of selecting judges a variety of interests that are thought to have a legitimate concern in the matter and at the same time to discourage other intrests. It may be assumed that these interests will engage in the "politics" of judicial selection, that is, they will maneuver to influence who will be chosen as judges."*

Thus, far from taking judicial selection out of politics, the Missouri Plan actually tended to replace politics, wherein the judge faces popular election or selection by a popularly elected official, with a somewhat indirect process of state bar and bench politics masquerading as professionalism. The conclusion is inescapable: merit selection has little or no merit if by merit we mean that nonpolitical considerations dominate the slection process. Professional considerations turn out to be next to meaningless when applied in the real world. They are ideals that no one has succeeded in translating into tangible workable guidelines. (Ashman and Alfini, 67)

Moreover, it is contradictory to attempt to remove

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Supreme Court, Court of Appeals, and those Circuit Courts which have adopted the Commission plan. (To date commission plans exist for the circuit courts of Jackson, Clay, Platte and St. Louis Counties and the City of St. Louis).

A. *Initial Selection:*

Judges are appointed by the governor from a list of nominees submitted by a nonpartisan judicial selection commission. If the governor fails to appoint a candidate within 60 days of receipt of the list the commission appoints one of the nominees to fill the vacancy.
Mo. Const. art. V, sec. 25(a)

B. *Vacancies:*

Vacancies are filled as in initial selection.

C. *Retention:*

The appointee serves an initial term ending on December 31 following the next general election after the expiration of twelve months in office. At the general election held prior to the expiration of his term an appointed judge may run for retention. Failure to file a declaration of candidacy for retention creates a vacancy. The question of retention is placed on a separate nonpartisan judicial ballot. A judge must win a majority of votes in favor or retention in order to serve a full term. Otherwise, a vacancy exists.
Mo. Const. art. V, sec 25 (c) (1)

D. *Terms:*

The initial appointive term is for one year after appointment and until a successor has been elected and qualified.
The full terms are:
Supreme Court: 12 years
Court of Appeals: 12 years
Circuit Court:
Circuit Court Judge: 6 years
Associate Circuit Judge: 4 years
Mo. Const. art. V, sec. 19

Circuit Courts (in those counties which have not adopted the commission plan) and Municipal Courts

A. *Initial Selection:*

1. Circuit court judges and associate circuit judges are selected in partisan elections.
Mo. Const. art. V, sec. 16

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Circuit Court (Associate Judges)

A. *Initial Selection:*

Associate judges are appointed by the circuit judges in each circuit as the supreme court provides by rule. The chief judge of the circuit gives notice of a vacancy and attorneys may apply to fill the vacancy. Each circuit judge is presented with a ballot and may vote for one candidate for each vacancy.

Ill. Const. art. 6, sec. 8

Ill. Rev. Stat. ch. 110A, sec. 39

B. *Vacancies:*

See initial selection.

C. *Retention:*

An associate judge may file a request for reappointment with the chief judge of the circuit. Each circuit judge votes on the question of reappointment.

Ill. Rev. Stat. ch. 110A, sec. 39

D. *Terms:*

Four years.

Ill. Const. art. 6, sec. 10.

Circuit Court (Resident Circuit Judge or Resident Judge)

Ed. note: The term "resident circuit judge" or "resident judge" refers to a circuit judge who was appointed after June 30, 1971 by the supreme court to fill a vacancy existing prior to July 1, 1971 in the office of a former associate judge and whose office was, prior to July 1, 1971, filled by election from a single county or, in the case of Cook County, from one of the 2 units of the county.

Ill. Rev. Stat. ch. 37, sec. 72.41-1

A. *Initial Selection:*

Initial Selection is by partisan general or judicial election.

Ill. Const. art. 6

Ill. Rev. Stat. ch. 37, sec. 72.42

Relevant election law

See Part I A., relevant election law.

B. *Vacancies:*

See initial selection.

C. *Retention:*

See initial selection.

D. *Terms:*

Four years

Ill. Const. art. 6, sec. 10

Ill. Rev. Stat. ch. 37, sec. 160.2

Court of Claims

A. *Initial Selection:*

Initial Selection is by gubernatorial appointment with the advice and consent of the senate.

Ill. Rev. Stat. ch. 37, sec. 439.1

B. *Vacancies:*

See initial selection. In case of a vacancy during the recess of the senate, the governor makes a temporary appointment until the next meeting of the senate, when the governor nominates a person to fill the office.

Ill. Rev. Stat. ch. 37, sec. 439.1

C. *Retention:*

At the end of a term a judge of the court of claims must be reappointed by the governor, with the senate's approval, in order to retain office.

Ill. Rev. Stat. ch. 37, sec. 439.2

D. *Terms:*

Six years

Ill. Rev. Stat. ch. 37, sec. 439.2

politics from the process of selecting political decision makers. As long as judges decide cases on the basis of socioeconomic and political values, those who choose judges will undestandably insist that these same value considerations weigh heavily in the seletion process. It can be no other way, although reformers will continue in their attempt to lead using the search for the philosopher's stone by perpetuating the myth, that internal contradiction, of nonpolitical selection. (Glick 55)

A second argument freuently made by proponents of merit selection is that in replacing partisan political considerations with professional criteria, the merit plan invevitably produces better judges- that is judges with superior professional and personal qualifications. Beyond a consenus that judges ought to be judicious, have proper judicial temperament, be objective, and perhaps have prior judicial experience, therr remains no direct measure of what a good judge is. Not only is there little evidence of the superiority of judges selected by the merit system (although there is some evidence to the contrary), there is in fact little to show that judicial selection mechanisms, make any difference at all.

In an early study in 1964 examining trial judges in twelve states with different types of selection systems, Herbert Jacob found that "if judicial quality can be measured by the extent of prelaw college education, or attendance at a prestigious law school, the Missouri plan

Missouri found that in 179 separate judicial ballots over a twenty five year period, only one judge was ever turned out of office, and this under highly unusual circumstances.(Watson and Downing, 345). In a more recent study of 353 judges, who stood for retention elections, only three trial judges were rejected. (Jenkins, 80) This indicates a rejection rate so low (an average of about seven tenths of one percent based on the above data) as to be inconsequential.

It is not difficult to understand why retention elections do not work. The old political saw "you can beat somebody wth nobody" clearly applies. Overall, merit plan judges are retained by seventy five to eighty percent of the vote. Although turnout is usually quite low, and this obtains almost without regard to the judges party, age, ability, or any other known vairable. Between 1970 and 1978 the Illinois State Bar Association recommended against the retention of thirty three sitting judges. Thirty one of these were retained. In 1972, they recommeded against ten, all of whom were retained. In 1978, the Chicago Council of Lawyers, one of two Chicago area bar associations which rate incumbent judges, recommended against retaining thirteen judges, twelve were retained. (Jenkins 84)

If the lay, the professional, and even the political inputs built into the Missouri plan do not work as advertised, and if the plan in general cannot be shown to produce superior judges, what is left of the argument? The

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Appendix B
Number of Judges Not Retained: 1972-1978*

Year	States Holding Retention Elections	Number of Judges on Retention Ballots	Number of Judges Not Retained
1972**	Alaska	7	—
	Colorado	98	3
	Florida	4	—
	Illinois	109	—
	Indiana	8	—
	Iowa	30	—
	Kansas	3	—
	Missouri	26	—
	Nebraska	8	1
	Oklahoma	2	—
	Utah	11	—
Total	11	306	4
1974	Alaska	18	—
	California	28	—
	Colorado	41	—
	Idaho	60	1
	Illinois	40	1
	Indiana	7	—
	Iowa	51	1
	Kansas	3	—
	Missouri	35	—
	Nebraska	23	—
	Oklahoma	7	—
	Tennessee	16	—
	Utah	6	—
	Wyoming	6	1
Total	14	341	4
1976	Alaska	10	—
	Arizona	18	—
	Colorado	95	1
	Idaho	7	—
	Illinois	41	1
	Indiana	2	—
	Iowa	30	—
	Kansas	26	—
	Missouri	24	—
	Montana	21	—
	Nebraska	55	1
	Oklahoma	4	—

Appendix B (cont'd.)

Year	States Holding Retention Elections	Number of Judges on Retention Ballots	Number of Judges Not Retained
	Tennessee	4	—
	Utah	5	—
	Wyoming	11	—
Total	15	353	3
1978	Alaska	18	—
	Arizona	24	2
	California	29	—
	Colorado	84	4
	Florida	9	—
	Idaho	54	—
	Illinois	93	4
	Indiana	10	1
	Iowa	61	2
	Kansas	29	—
	Maryland	5	—
	Missouri	34	—
	Nebraska	14	—
	Oklahoma	6	—
	Tennessee	4	—
	Utah	20	—
	Wyoming	5	—
Total	17	499	13
Grand Total		1499	24

* Georgia and Pennsylvania hold retention elections in odd-numbered years.

	1973	1975	1977	1979
Georgia	8/0	—	8/0	—
Pennsylvania	19/1	39/0	19/0	35/2

The first figure indicates the number of judges running on the retention ballot; the second indicates the number not retained.

** Data for 1972 were taken from "Merit Retention Elections in 1972," *Judicature*, 56 (January, 1973), 254-56. Data for 1973-1979 were obtained directly from state government offices.

answer is, not much. However, despite the lack of emprical evidence supporting the superiority of merit selection, the idea of professional neutrality in judicial recruitment is both appealing and consistent with general professional ideology. Futhermore, advocates of the merit plan make strong arguments, which we will examine, against the alternative method. (Glick 34)

Judicial Election

If merit selection, among these dimensions examined, has so little merit, what are the alternatives? All this considered is it preferrable to elect judges? Or is legislative or perhaps executive selection the best system. Our answer must depend on the perceived consequences of these altenative plans and upon how we would weigh such consequences. The familar argument usually set in favor of electing judges is that:

> *"Whereas America purports to be a democracy; whereas democracy is usually defined as a governmental arrangement wherein policy makers are held accountable to policy recipients;, whereas judges are policy making officials, and whereas elections are the usual method for ensuring or at least promoting political accountablity; election is the preferred method of judicial selection, because such a system best assures accountability and hence is the most consistent with prnciples of democratic government."*

The central point to be made about judicial elections is that they are <u>not</u> elections, at least as that term is generally understood. This is true on several counts. First, in states providing for the election of at least some judges, whether on a partisan or nonpartisan ballot, and that includes some thirty states by 1986, a large proportion of judges initially obtain their seats by executive appointment. Herndon found that fifty six percent of those who became judges during the period from 1948 to 1957 were appointed by state governors to replace judges

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TABLE 5-3
"Elected" Trial Judges Initially Gaining Office by Appointment

Partisan Election States		Nonpartisan Election States	
Arkansas	5.9%	Michigan	34.3%
West Virginia	10.3%	Ohio	40.5%[a]
New York	23.2%	Kentucky	44.8%
Illinois	26.8%	Wisconsin	49.0%
Louisiana	29.2%	North Dakota	50.0%
Mississippi	33.4%	South Dakota	52.2%
Alabama	42.4%	Montana	61.1%
Pennsylvania	51.5%	Oregon	66.7%
Georgia	57.8%	Washington	67.6%
Tennessee	57.8%	Nevada	73.3%
New Mexico	73.0%	Idaho	83.3%
North Carolina	68.2%	Maryland	84.5%
		California	88.3%
		Minnesota	93.0%
		Florida[b]	
		Oklahoma[b]	

SOURCE: John Paul Ryan, Allan Ashman, and Bruce D. Sales, "Judicial Selection and its Impact on Trial Judges' Background, Perceptions and Performance." Paper presented at the Western Political Science Association Meeting, Los Angeles, March 16–18, 1978, Table 10, p. 26 (original data revised for inclusion herein).

[a] Ohio is not entirely a nonpartisan system for selecting judges. Judges of general jurisdiction are nominated by partisan primary, then elected on a nonpartisan ballot.

[b] Florida, in 1971, and Oklahoma, in 1967, changed from partisan election to nonpartisan election. It is difficult from our data to provide reliable estimates of the percentage of judges initially elected under either system.

there is a contest, the challenger is usually unsuccessful. Typically, if competition emerges, it is more likely to occur against judges who were originally elected than those who received their seats through appointment. Furthermore, competition is more likely in the first election than in subsequent races.[48]

[48] In North Dakota between 1950 and 1970, district judges' races went uncontested about 80 percent of the time. See note, "Judicial Selection in North Dakota: Is Constitutional Revision Necessary?" *North Dakota Law Review* 48, No. 2 (Winter 1972): 333. And Glick argues that:

> Of the total number of judicial elections held in the fifty states, closely contested, partisan "unjudicial" judicial elections probably constitute no more than five to seven percent of the total. Figures from other research show that few judges are ever challenged, and almost never face a close, hard-fought campaign. Even after the election is over, no matter how it was fought, the incumbent usually comes out the winner.

See Glick, "Promise and the Performance," p. 519.

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Supreme Court, Appellate Court and Circuit Court

A. *Initial Selection:*

Supreme, appellate and circuit judges are nominated at primary elections or by petition and elected at general or judicial elections on a partisan ballot.

Ill. Const. art. 6, sec. 12

Relevant election law

Ill. Rev. Stat. ch. 46, secs. 2A-1.1, 2A-9, 7-1, 7-5, 7-10, 7-12, 7-19, 7-61, 7-63, 7A-1, 16-16-.1, 17-18.1, 24-11

B. *Vacancies:*

Vacancies are filled by appointment of the supreme court. A person appointed to fill a vacancy 60 or more days prior to the next primary election to nominate judges serves until the vacancy is filled at the next general or judicial election. A person appointed to fill a vacancy less than 60 days prior to the next primary election serves until the vacancy is filled at the second election following such appointment.

Ill. Const. art. 6, sec. 12(c)

Relevant election law

See initial selection.

C. *Retention:*

Not less than six months before the general election preceding the expiration of his term of office, a supreme, appellate or circuit judge who has been elected to that office may file a declaration of candidacy to succeed himself. The names of judges seeking retention are submitted to voters, separately and without party designation, on the question of whether the judge shall be retained in office for another term. An affirmative vote of three-fifths of the electors voting on the question is required for retention.

Ill. Const. art. 6, sec. 12(d)

Relevant election law

See initial selection.

D. *Terms:*

Supreme Court: 10 years
Appellate Court: 10 years
Circuit: 6 years
Ill. Const. art. 6, sec. 10

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Mo. Ann. Stat. sec. 478.010 (Vernon)
Mo. Ann. Stat. sec. 478.320 (Vernon)

2. Any city, town or village may, and cities with a population of four hundred thousand or more must, provide for a municipal judge or judges. Associate circuit judges act as municipal judges in any municipality with a population of under four hundred thousand which has requested associate judges to act as municipal judges and which has not provided for a municipal judge. In those municipalities that have provided for municipal judges the method of selection is determined by charter or ordinance.
Mo. Const. art. V, sec. 23
Mo. Ann. Stat. sec. 479.020 (Vernon)

B. *Vacancies:*

Vacancies in the office of circuit judge or associate circuit judge are filled by special election.

Temporary vacancies and vacancies which arise less than six months prior to a general municipal election are filled by appointment of the mayor or chairman of the board of trustees. Vacancies which occur more than six months prior to the general municipal election are filled by special election.
Mo. Ann. Stat. sec. 479.230 (Vernon)
Relevant election law
Mo. Ann. Stat. sec. 115.123 (Vernon)
Mo. Ann. Stat. sec. 115.125 (Vernon)
Mo. Ann. Stat. sec. 115.127 (Vernon)

C. *Retention:*

See initial selection.

D. *Terms:*

1. Circuit Court:
Circuit Judges: 6 years
Associate Circuit Judges: 4 years
Mo. Const. art. V, sec. 19
2. Municipal judges' terms are provided for by local charter or ordinance but in no case can they be less than two years.
Mo. Ann. Stat. sec. 479.020 (Vernon)

Probate Court Commissioners

Ed. note: There are three types of probate court commissioners: those in counties having a population greater than 400,000, those in Jackson County and those in St. Louis County. Probate court is a division of the circuit court.

A. *Initial Selection:*

Commissioners in counties having a population of greater than 400,000 and commissioners in St. Louis County are appointed by the judge of the probate division of the circuit court.

Commissioners in Jackson County are appointed by a majority of the circuit court judges meeting en banc.

Mo. Ann. Stat. sec. 478.265 (Vernon)
Mo. Ann. Stat. sec. 478.267 (Vernon)
Mo. Ann. Stat. sec. 478.266 (Vernon)

B. *Vacancies:*

See initial selection.

C. *Retention:*

See initial selection.

D. *Terms:*

Commissioners in counties having a population greater than 400,000 serve at the pleasure of the judge who appointed them but in no case do they serve beyond the term of the appointing judge.

Commissioners in St. Louis and Jackson counties serve four year terms.

Mo. Ann. Stat. sec. 478.265 (Vernon)
Mo. Ann. Stat. sec. 478.267 (Vernon)
Mo. Ann. Stat. sec. 478.266 (Vernon)

who had retired, resigned, or died while in office. Another study confirmed this finding and gave support to Herndon's chief conclusion. In all state supreme courts in non-Southern states from 1948 to 1974, fifty three percent of the 436 judges studied were initially appointed. Sixty seven percent of "elective" judges were appointed in nonpartisan election states, whereas forty two percent were so selected in partisan states. (Dubois, 106) The American Judicature Society undertook a nation wide study of the same phenomenon regarding trial judges. Their 1977 survey found that thirty percent of sitting trial judges in partisan states were initially appointed. Whereas some fifty seven percent were appointed in nonpartisan states. (Ryan, Ashman, and Sales, 26)

This brings us to a second general reason judicial elections are often criticized as someting less than meaningful: the very low incidence of electoral turnover of judicial seats. A host of factors relating to the rules of the game of judicial election and voter behavior help to explain why this is so. In the first place, the level of competiton is typically very low. Furthermore, competition is more likely in the first election than in subsequent races. Glick argues that

> *"of the total number of judicial elections held in the fifty states, closely contested, partisan "unjudical" judicial elections contstituted no more than five to seven percent of the total. Figures from other research show that few judges are ever challenged, and almost never face a close, hard fought campaign. Even after the*

election is over no matter how it was fought the incumbent usually comes out the winner." (Glick 519)

Judicial elections, therefore, though we have hardly covered all facets of the process, seem to fall short of their ideal function which is to ensure accountablity of judicial behavior. Or at least this is so as they are presently being conducted.

The second major part of the attack on popular elections is based upon a philosophic and normative argument not likely to be solved by empirical research. Critics assert that elections are inherently inconsistent with the principle of "judicial independence", a value which critics insist is fundamental to the sucessful operation of the judicial process.

Elections interfere with the role of judge as the unbiased and objective decision maker. Second, critics assert that judges need not be held accountable by elections because they are not engaged in the formulation or implementation of public policy. Finally, it is argued that even if it is admitted that judges make political decisions and engage in the making of public policy, the special place of the judiciary in the political system demands that judges not be held accountable for their actions (Daly 1).

The advocates of judicial accountability deny that courts require independence in order to give proper interpretation to constitutional and statuatory provisions.

> *Judicial review is not the product primarily of special legal erudtion or the objective views of constitutional and legal oracles, if it were, "divine appointment" would then be the proper method of recruitment (Dubois 27).*

The independent exercise of power of judicial review is undemocratic because it allows judges to make public policy without being responsive to, or held accountable by, the people or their representatives. In a democracy, the people, through the principle of majority rules, should be able to decide all questions of public policy, including those which bear upon the unflolding meaning of their constitution (Daly 5).

The critics of judicial elections do not rest their case solely on the requirement of judicial independence. Additionally, they argue that even if the need for judicial accountability is recognized, judicial elections are nevertheless ineffective mechanisms for securing popular control over the courts (Volcansek 18).

This is the most fundamental and damning of the criticisms leveled against popular elections. If elections do not hold judges accountable, as they are intended to do, then little else may commend them over other methods of selection. According to the critics, a nominating commission and a governor can, by virtue of the informational resources at their disposal, do a better job than the voters in successfully eliminating individuals who are ill-suited to hold a judicial office (Dubois 40).

First, popular control over the judiciary is inhibited by the fact that judicial election campaigns do not involve a discussion by opposing candidates of substantive issues of judicial policy. Second, due to the issueless and lackluster campaigns, critics urge that public attention to judicial contests is low, due to lack of interest. Third, it is argued that popular control over the judiciary through judicial election is threated by the fact that judicial elections are rarely seriously contested (Volcansek 49).

Admittedly, voters do not and probably cannot inform themselves on the details of the wide range of problems facing governmentand the merits of the variety of proposed solutions which government officials might adopt. But the important point is that voters need not be interested enough and informed enough to choose their leaders on the basis of specific policy issues. Though they cannot control the details of policy, voters can control the direction of policy formation. "The voters play an indirect role in the determination of public policy" (Dubois 22)

Voters are not the philosophical citizens demanded by a classical democratic theory, but neither are they manipulated subjects, driven in their voting behavior by irrational considerations unrelated to policy. The voters can affect and keep judges accountable for their actions if they are informed enough to make these general policy

decisions.

Conclusion

While the debate rages as to form, the underlying reality remains the same: neither those who influence the judicial selection process nor the substantive outcomes are much affected gy a change in the method of judicial section. Glick makes the point:

> *"It is probably impossible to alter the dominant features of a state political system by creting a new method of judicial selction. Instead, well established patterns of party politics and the action of political officials will adapt to the new method of selection and in turn, find ways of making the new method operate within the context of existing political conditions."*

The conclusions we have drawn concerning the influences at work in judicial selection also help us to understand why researchers are able to find so little difference in judicial recruitment outcomes, irrespective of the mechanism selected. The answer to the riddle, therefore, is that the mechanisms of each selection method are <u>not</u> that different; in fact, the end results dictate that they are about the same. Hence the exaggerated claims for one method, as well as criticism, by advocates of the other, are equally without foundation. If one method fails to produce distinctively better judges than the other, it is also true that competing selection methods also fail to produce the disastrous results often predicted by its critics. Neither the professional politician nor the professional legal practiioner has anything to gain through

the appointment of incompetent persons to the bench. As already explained, political parties have a good deal riding on judicial performance, not only in terms of substantive policy outcomes but also in the favorable reflection on the party. Even more, legal professionals are concerned with selecting candidates with reputations of intelligence and skill, both political and legal. Both sides therefore, usually select well-qualified people who in turn perform in an acceptable manner. Mistakes occur, to be sure, but they are not due to the method of judicial selection.

Having said this, however, it is still neccesary to choose some method of judicial selection. As noted earlier, the final decision of which judicial selection method to choose depends primarily on the individual view of how the judiciary should function as well as the collective view of how the politics of the other systems of government should interact with the judicial system. At first look, selection by popular elections, or alternatively, selection by popularly elected officials, is most consistent both with a political conceptualization of the judiciary and the requirements of democarcy. Simply put, if judges make policy, democratic governmental arrangements require that they be held accountable to the people, and elections are the best, though by no means a perfect, means of ensuring this accountability. (Dubois, 768)

The principles of merit selection, on the other hand, seem more in keeping with a mechanical or Blackstonian veiw of the judicial function, and it could be argued, more consistent with a parentalistic view of society by the legal profession; (we the professionals know best who would make good judges). But if we can accept the logic of the argument that the popular election of judges is the preferred method; what of the accountability problem mentioned previously? Such accountablity is ill served by an electoral system that is to a large extent appointive and that in addition, lacks competitiveness and voter participation.

The answer, I offer, is that the trouble with elections is not with the elections themselves but with their underlying logic. It is the myth that a nonpolitical judiciary, fostered by bench and bar through quasi-professional rules such as the Code of Judicial Conduct, and impossible expectations, that turns otherwise spirited campaigns for judicial offices into non-interesting ones. The belief that a frank discussion of issues compromises judicial independence or the view that their really are no issues to discuss, that judcial matters must be handled in a neutral manner, are the reasons why judicial elections are noncompetitive and judges do not campaign. Unfortunately, this runs contrary to the premise behind the ballot box and results in reducing the effectiveness of judicial elections in either bringing the

judiciary to account, promoting competition, and sparking voter interest and knowledge. (Berg and Flynn, 45) As noted by Atkins:

> *"the process of conducting present judicial elections produces and perpetuates ignorance among the electorate. Jurisprudence assumes that judicial decisionmaking is qualitatively different from decisionmaking processes within other governmental institutions. Moreover, th hallmark of the judicial robe is that of the neutral judge adjudicating disputes unencumbered by political liabilties. This drive toward defending the integrity of the judicial profession, however, has meant in reality, that the kinds of information needed to evaluate judges performances are not made available to the electorate, particularly the judges view of issues which might be relevant to pending or future litigation. The manner in which relevant information concerning issues and candidates is made virtually inaccessible to the electorate establishes tremendous hurdles which supporters of judicial elections must overcome. Naturally such a system would tend to produce poor results, at least from the perspective of knoweldgable voter participation."*

But even taking judicial elections as they are, they rather than as they could be, we might conclude that as instruments of accountabilty they have not totally failed. When compared with elections for the executive and the legislature, rather than with a democratic ideal that has never been achieved in any election, they do not come off so badly. On this crucial point of effectiveness of partisan elections, since there really are no other kind, as instruments of accountabilty in the judiciary, the most thorough study to date of the process, again by Atkins, concludes as follows;

> *"Though elections are blunt instruments of accountabilty, they are effective in maintaining popular control of the outer limits of governmental decision making. As long as voters can know within such wide limits the general ideological and political orientations of these individuals they put in policy making positions, they will be able to exercise effective indirect control over their own affairs. In the context of judicial elections, therefore, since it appears that a certain amount of judicial decision making will necessarily have a partisan base, regardless of the formal method of selection, voters can acheive maximum control over the broad outlines of judicial policy through partisan elections, at least as much as they currently seem to have with respect to controlling policymaking in the other two brances of government." (Atkins, 155)*

The founding fathers gave us a republic with the catch that it is ours only if we can keep it. In harsh, idealistic terms, an irresponsible electorate gets what it deserves, sooner or later. To merely push decisions onto others in order to avoid or circumvent an ignorant electorate is not only dangerous but irresponsible. I am not against the merit plan because of what the merit plan encompasses, but because of the policy that it replaces and the precedent in which it is sets regarding the capability of the average citizen.

If this nation is a true procedural democracy, then we should abandon the excuses whether or not they are justified that the public is, as a whole, too ignorant, uninterested, influenceable, indifferent, and apathetic to make the choices necessary to produce a judicial branch capabale of ensuring justice; and instead educate the

public so that they can make a rational choice. I feel that it is contradicting to say that the same public who is supposedly responsible enough to decide on the most important elected position in the world, the President of the United States, and 535 senators and representatives is not responsible enough to vote for judges in their own state.

I am skeptical that select commissions made up of the "more educated among us" are really more qualified to choose the better judge. People who favor merit plans over elections are showing a "transparent distrust of the electorate", a truly undemocratic ideal. They are showing an unyielding lack of faith in the ability of the electorate to size up the issues at hand and make a rational decision. They unrealistically and pessimistically refuse to believe that the public can be educated, and that they are not indifferent and disinterested. In closing, if the "merit plan" advocates are really trying to produce a higher quality and effective judiciary, then they should start by using the democratic process which the judiciary is sworn to protect-- not circumventing it.

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