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# Opinion: Why Merit Selection Is Inconsistent with Democracy

Julius Uehlein\* & David H. Wilderman, Esq.\*\*

We should never lose sight of the fact that judges are people and that their decisions are the product of their life experiences. Technical expertise alone does not make a judge. If that were so, we could turn judging over to computers. To the contrary, judges decide the most important questions on the basis of their personal judgments made within the permissible parameters of the law. Law is not a science; if it were, it would be difficult to explain split decisions and appellate court reversals. In reality, the law is a product of a person's reason and judgments; therefore, the people making such judgments and their orientation makes all the difference in their decisions and, ultimately, in the interpretation of our laws.

The Pennsylvania AFL-CIO has opposed giving to a select few the right of our members to participate in the selection process. Organized labor views the merit selection (political appointment) process as a wonderful public relations gimmick for disguising a power shift from the people to an elite crew—a completely undemocratic process that empowers non-elected lawyers and others to select judges with little or no accountability to the people. Our democratic tradition is built on the right to vote and those who seek to abolish that right should be required to meet a heavy burden of overwhelming evidence. If the issue is close it ought to be resolved in favor of this precious right. Not to value this fundamental right highly would present a serious erosion of our democratic form of government.

This is not to say that the present elective system is not without problems. It would be wrong to assume, however, that a change to a

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\* Former President, Pennsylvania AFL-CIO.

\*\* Director of Legislation, Pennsylvania AFL-CIO. The following article represents the current position of the Pennsylvania AFL-CIO at the time of its writing in March 2001. The Pennsylvania AFL-CIO has one million affiliate union members. Our position is rooted in our strong support in our democracy for accountability to the electorate for each branch of Government.

different system would automatically bring about improvement. The truth is that there are problems with both concepts. One who focuses attention only on the evils of either system can easily find reason to advocate the other. Wisdom may be derived only by comparing the advantages as well as the deficiencies of both systems in order to determine which is preferable.

Proponents of merit selection decry the potentially corruptive influence of politics in general, and fund-raising in particular, upon the judiciary. The public, they argue, neither knows enough about the candidates to make an informed choice nor has sufficient interest in the judiciary to learn about the candidates. These proponents of merit selection complain that the public pays little or no heed to ratings of candidates published by the various bar associations. They contend a small group of highly informed individuals would do a better job than such an uninformed public of identifying the best candidates for judicial office.

What this argument fails to address, are the alternatives in addition to "political appointment." Specifically, in a democracy, we vote for virtually all public officials, such as jury commissioners. The better alternative in a democracy is to improve the knowledge base of the electorate. In judicial elections, labor spends considerable effort to inform our members, and candidates appear before labor groups. In addition, discussion on issues, ballot position reform, dropping country of origin and public financing of campaigns are leveling reforms that would create a more informed electorate.

As to the potential for corrupting political influence, it cannot be seriously argued that appointment by a commission or governor is less political; it is simply less public. Under political selection plans, the governor not only makes the judicial appointment, but also picks the pickers as well. The nominating procedure of the political parties may be less visible than the ideal, but the selecting process of merit commissions is invisible by comparison. The precise reason a particular candidate is passed over, in effect barred from seeking office, is never revealed; yet, the stigma remains with that person forever.

Although the necessity for political contributions may be lamentable, if not out-and-out distasteful, such contributions are insulated to the extent that the support and any potential for influence is diluted among the hundreds of thousands of voters without which a candidate cannot succeed. It is, after all, the voter who puts a judge in office. Contrasted with the individual campaign contributor, a member of an appointive commission has an infinitely greater opportunity for corrupt influence; there is no insulation there. If a committee member is a lawyer, for example, every court of common pleas judge before

whom the member appears will know that this individual could hold the key to that particular judge's future.

Further, substituting a commission for the voting electorate may well result in depriving many of the opportunity to attain judicial office. Many would be eliminated because they graduated from the wrong school, or because their name ends in the wrong syllable, or because they worship in the wrong place, or because they are not the right color or sex. The commissions are dominated by lawyers who tend to be senior partners at large, metropolitan firms. The selection process yields to bluebloods at the expense of small offices or solo practitioners or graduates of less prestigious law schools. The so-called merit selectors, who are in reality political appointees, too often exclude certain ethnic and religious groups from the bench.

Proponents of the political appointment system argue that the present system resembles a lottery because candidates are generally unknown and not screened for qualifications. Political appointment supporters assert that the general public just does not have the intelligence to make a good selection. Again, the term "qualified" is a loaded term; its meaning depends upon who is using it. "Qualified" may describe an individual who by experience and training is expert in the subject matter of a particular kind of case. Others might argue that qualified—and incidentally the word "qualified" can also be interpreted as meaning meritorious—could describe a lawyer who strictly adheres to the interests of legal precedence favoring one group or another. Qualified or meritorious generally does not mean technically legally qualified.

The role of politics in judicial selection is not as jaded as critics would have us believe. There is benefit to previous political experience shaping a judicial temperament that is responsive to the needs of society. To be successful, a political campaign must be broad based, exposing the candidates to the wants and needs of every element of our society. Far from being corruptive, this exposure can be an invaluable educational experience, a resource from which the candidate may later draw in weighing competing interests to arrive at a rational and equitable judgment. Because politicians must be sympathetic to social trends and responsive to change to maintain their following, a political background prevents a judge from ignoring these factors. After all, judges are more than just lawyer-technicians; they are interpreters of the law. They cannot fulfill that role without a vivid awareness of the compelling needs of a changing society.

Specific reforms to the current electoral system would avoid the lottery concerns, allow candidates to discuss issues, and eliminate county designation or cross-filing. We can make the following

improvements in the election process without denying citizens their right to vote:

- instituting public financing of judicial campaigns, which could involve a mix of public and private funding with limitations;
- requiring candidates to file statements of financial interest with the Pennsylvania Ethics Commission;
- rotating ballot position by county or congressional districts;
- providing improved access to public television to promote judicial candidates and education about the appellate courts;
- lifting the “gag rule” to let judicial candidates reflect their philosophy and ideology without discussing the outcome of particular decisions that might come before the courts; and
- eliminating retention by requiring judicial incumbents to seek election based on their records of performance.

Retention elections are cosmetic and are not an acceptable substitute for popular input in the initial selection process.

The AFL-CIO is concerned that resuscitating the political selection of judges poses serious problems in a democratic society. The burden to remove the right to vote falls on those who seek to narrow the electoral process. Fundamentally, the issue devolves to the simple question of to whom our judges are accountable. If the public is the selection authority, accountability for career changes to appellate judges encourages a general public accountability. Democracy is not easy. It requires an informed electorate. Candidates must be given public financing and allowed to speak on specific issues within reasonable boundaries. The answer to these problems is not to be found in limitations on the right to vote, but in expansions of the political process.