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Who's Judging Whom? Why Popular Elections are Preferable to Merit Selection Systems

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Articles

Who's Judging Whom? Why Popular Elections are Preferable to Merit Selection Systems

The Honorable Peter Paul Olszewski, Sr.*

I. Introduction

Merit selection is merit politics!

Popular election of judges, however, is the most democratic, representative, and efficient method of judicial selection. It is utilized by

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Judge Olszewski recognizes the work of Matthew E. Dunham and Stephen Molitoris on this article. Mr. Dunham is a graduate of the Penn State Dickinson School of Law and was Judge Olszewski's law clerk from September 2003 to August 2004. During his clerkship, Mr. Dunham made significant contributions to the research, writing, and editing of this article. Mr. Molitoris graduated from Villanova Law School in May 2004. During a summer internship with Judge Olszewski, Mr. Molitoris gathered research and collaborated with Judge Olszewski on the first draft of this article.

the majority of states and should be adopted by those states that currently appoint judges. Popular elections provide the most democratic form of judicial selection because they give citizens a direct role in choosing the judges that represent them. When judges are appointed by a selection committee or by a governor, however, the citizenry is deprived of their fundamental right to vote and select judges. The election system is not without its flaws, but such imperfections can be remedied. In contrast, the weaknesses of the so-called merit selection system are not easily resolved.

Part II of this article provides a general history of judicial selection in the United States, and specifically, in Pennsylvania. Part III focuses on why popular elections are preferable to merit selection methods of choosing judges. This section, while dispelling several false claims made by merit selection advocates, argues that popular election of judges is the most democratic approach to choosing a judiciary. This article maintains that voters are capable of making informed decisions when choosing judicial candidates, and that popularly elected judges remain independent and impartial. Part IV acknowledges that there are some areas in which the judicial election system can improve, and goes on to outline several means for improving the system's virtues. Finally, Part V concludes this article.

II. Historical Overview of Judicial Selection

A. General History of Judicial Selection

The controversy surrounding judicial selection began as a separation of powers struggle between King Richard II of England and the British Parliament. In 1387, the Chief Justice of the King's Bench, Tresillian, was hanged after Parliament impeached him for advising Richard II that a parliamentary commission was invalid and traitorous because it usurped powers relegated to the monarch.[1] This event highlighted the debate over who controlled judicial selection, a controversy that continued through 1701, when the Act of Settlement granted judges tenure during good behavior, and authorized judicial removal only upon a vote of both Houses of Parliament.[2]

The judicial selection dilemma then carried over into the colonies, where King George III retained absolute control over selection,

1. The Honourable Lord Justice Brooke, *Judicial Independence: Its History in England and Wales*, *available at* http://www.jc.nsw.gov.au/fb/fbbrook.htm (last visited April 5, 2004).

2. Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 369 (2002).

appointment, and removal of judges.[3] Thomas Jefferson assailed the English judicial system, noting that

> the wretched criminal, if he happened to have offended on the American side, stripped of his privilege of trial by peers, of his vicinage, removed from the place where alone full evidence could be obtained without money, without counsel, without friends, without exculpatory proof, is tried before judges predetermined to condemn.[4]

As the Revolutionary War approached, American colonists took issue with apparent inconsistencies in judicial tenure among colonial judges. The colonists sought to wrestle control of the judiciary away from the King.[5] Parliament decided to pay colonial judicial salaries from taxes levied on commodities imported to America, exasperating the colonists.[6] Disenchanted with the lack of access to a fair legal system, the colonists included their judicial tenure and salary grievances in the Declaration of Independence, stating that the King "has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries."[7]

After the Revolutionary War was fought and won by the colonial Americans, newly formed states balked at the selection of judges by a single individual, as had been done in England.[8] Eight states established appointment by the legislature, while the remaining five required legislative approval of appointees.[9] Further, while constructing the United States' federal court system, the constitutional framers relied heavily on the writings of Charles de Secondat Baron de Montesquieu and William Blackstone, both of whom saw an independent judiciary as an integral part of democratic society.[10] Montesquieu, in particular, stressed the need for the popular election of judges.[11] It is thus clear that from the birth of our nation, the election of judges embodied the system of checks and balances required by state governments and the U.S. Constitution.

In 1812, Georgia went beyond simply granting the legislature the right to select judges, becoming the first state to adopt popular elections

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3. Kelley Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 628 (2002).

4. THE PORTABLE THOMAS JEFFERSON 13 (Merrill D. Peterson ed., Penguin Books 1975).

5. Muniz, *supra* note 2, at 369.

6. *Id.*

7. THE DECLARATION OF INDEPENDENCE, para. 11 (U.S. 1776).

8. Armitage, *supra* note 3, at 629.

9. *Id.*

10. Muniz, *supra* note 2, at 370.

11. *Id.*

as a means of choosing judges.[12] Mississippi followed suit in 1832, and by the height of Andrew Jackson's presidency, an increasing number of states had turned judicial selection over to the people.[13]

After the Civil War, however, one party began to dominate the political process through mechanisms such as patronage politics and political machines, leading some states to seek alternative methods of judicial selection.[14] In 1934, California established a commission to select judges, and in 1940, Missouri organized a panel of legal and non-legal representatives to nominate three candidates from whom the governor would chose one.[15] Under the Missouri scheme, each judge would face a retention election after serving an initial term on the bench.[16] Eventually, this method of choosing judges became known as the Missouri Plan, and in the years that followed, nineteen other states adopted it in some form.[17] Despite this trend, however, twenty-one states retained the election system, and ten states utilized some combination of the two.[18]

In summary,

> [e]lecting judges was an idea of nineteenth century Americans who believed in the right of self-government and who sought to protect their judges from domination by sordid politicians. Merit selection of judges, subject to periodic retention elections, was an idea of early twentieth century Americans who believed that law is a science or an arcane technology unrelated to politics and properly entrusted to experts.[19]

B. History of Judicial Selection in Pennsylvania

Article V, Section 13 of the Pennsylvania Constitution establishes the method of judicial selection in the Commonwealth. It provides, "[j]ustices, judges and justices of the peace shall be elected at the municipal election next preceding the commencement of their respective terms of office by the electors of the Commonwealth or the respective districts in which they are to serve."[20]

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12. Armitage, *supra* note 3, at 629.
13. *Id.* at 629-30.
14. *Id.* at 631-32.
15. *Id.*
16. *Id.* at 632-33.
17. *Id.*
18. The American Judicature Society, Judicial Selection Methods in the States, *available at* http://ajs.org/selection/sel_state-select-map.asp (last visited April 26, 2004).
19. Paul D. Carrington & Adam Long, *Symposium: Selecting Pennsylvania Judges in the Twenty-First Century*, 106 DICK. L. REV. 747, 747 (Spring 2002).
20. PA. CONST. Art. V, Sec. 13(a).

The method for choosing the judiciary, however, has changed many times throughout Pennsylvania's history. In 1776, Pennsylvania's first Constitution provided for judges to serve seven-year terms after being appointed by the president (i.e. governor) of Pennsylvania and a quorum of the twelve-member Executive Council.[21] In the Constitution of 1790, power shifted and the governor was given the authority to appoint judges for life.[22] By 1838, following growing sentiment seeking to hold all governmental actors accountable to the voters, the tenure of Pennsylvania Supreme Court Justices was reduced from life to fifteen years.[23] Finally, in 1850, after passage by the legislature, the voters adopted a Constitutional amendment for the popular, partisan election of all judges.[24]

And yet, controversy over whether judges should be elected or appointed arose again at the 1967-1968 Constitutional Convention.[25] There, advocates of merit selection proposed a constitutional amendment providing for an appointment system.[26] The measure was submitted to voters in the 1969 primary election, but Pennsylvanians voted down the proposed amendment, deciding that they were capable of electing their own judges.[27]

More recently in 1988, the Governor's Judicial Reform Commission, popularly known as the Beck Commission, a blue ribbon committee established by Governor Casey, recommended a constitutional amendment that would provide for a mixed system of judicial election and appointment.[28] Notably, there was a strong dissenting statement in the Commission's report,[29] and no such amendment was, or has been, forthcoming. In fact, legislative attempts to modify Pennsylvania's system continually fail, and citizens of the Commonwealth repeatedly oppose modifications to the direct election of

21. PA. CONST. Sec. 20; Sec. 23 (1776). A quorum of the Executive Counsel was achieved by the presence of five members. *Id.*

22. PA. CONST. Art. II, Sec. 8; Art. V, Sec. 4 (1790).

23. Ellen Mattleman Kaplan, *Pennsylvanians for Modern Courts, Blueprint for the Future of Judicial Election Reform*, Pennsylvanians for Modern Courts, *available at* http://www.pmconline.org/blue/blue_Main.htm (July 1999).

24. American Judicature Society, *Judicial Selection in the States: Pennsylvania*, *available at* http://www.ajs.org/js/PA_history.htm (last visited April 27, 2004).

25. Ellen Mattleman Kaplan, Pennsylvanians for Modern Courts, *Blueprint for the Future of Judicial Election Reform*, Pennsylvanians for Modern Courts, *available at* http://www.pmconline.org/blue/blue_Main.htm (July 1999).

26. *Id.*

27. *Id.*

28. REPORT OF THE GOVERNOR'S JUDICIAL REFORM COMMISSION, Phyllis W. Beck, Chairperson (January 1988).

29. *Id.* at 202.

the judiciary.[30]

As stated above, voters elect all judges on Pennsylvania's Supreme Court, Superior Court, Commonwealth Court, and Courts of Common Pleas.[31] Judicial candidates run in partisan elections, and the winning candidate is elected to a ten year term of office.[32] At the end of that ten year term, judges wishing to retain their position can run in a retention election.[33] Retention elections differ from re-elections because judges seeking second terms do not face challengers, whereas in general re-elections judges may have to compete with other candidates.[34] In retention elections, voters simply decide whether they want to retain or remove the judge from the bench. If a majority of voters choose not to retain a judge, a vacancy is created that will be filled by gubernatorial appointment.[35] Otherwise, the retained judge will serve another ten year term.[36]

III. Popular Election of Judges is Preferable to Merit Selection

A. A Comparison: Election v. Merit Selection

Clearly, election and merit selection systems employ different means for choosing judges. There are, however, variances within merit and election systems. Furthermore, not all states use pure elections or merit selection to choose their judges; they use some combination of the two.

In states that use the election system to select judges, the general population votes for their preferred candidate, and the winner serves for a period of years. Currently, there are twenty-one states that *exclusively* use popular elections to select judges.[37] Of these twenty-one states, eight employ partisan elections, twelve employ non-partisan elections, and one utilizes a combination of partisan and non-partisan elections.[38] Ten other

30. *Id.* During the 1989-1990 session of the General Assembly, two merit selection bills (SB 594 and HB 941) were introduced and defeated. American Judicature Society, *Judicial Selection in the States: Pennsylvania*, *available at* http://www.ajs.org/js/PA_history.htm (last visited April 27, 2004).

31. PA. CONST. Art. V, Sec. 13.

32. *See* 42 Pa. CONS. STAT. § 3152.

33. *See* 42 Pa. CONS. STAT. § 3153.

34. *Id.*

35. *Id.*

36. *Id.*

37. American Judicature Society, *Judicial Selection in the States: Initial Selection, Retention, and Term Length*, January 2004, *available at* http://www.ajs.org/js/SelectionRetentionTerms.pdf (last visited April 28, 2004).

38. *Id.* (States that exclusively use partisan elections include: Alabama, Illinois, Louisiana, Ohio, Pennsylvania, Texas, and West Virginia. *Id.* States that exclusively use

states utilize popular elections to elect part of their judiciary.[39] Of the thirty-one states that use elections to select all or some of their judges, twenty-nine states require the judge to stand for reelection after serving their initial term, while two states hold retention elections.[40]

The merit selection system also varies from state to state. Some states use a nominating commission to propose candidates for the governor or legislature to select, while others allow the governor or legislature to select judges directly.[41] Selection committee panels may include the governor, attorney general, state supreme court justices, bar association officers, senate members, and private citizens.[42] After an initial term in office, appointed judges may face retention elections or they may be re-appointed by a commission, governor, or legislature.[43]

There is much debate about the virtues and deficiencies of both of these systems.[44] Some of the major issues facing judicial selection are outlined below. When the two systems are compared, it is clear that the popular election of judges is a superior method of judicial selection.

B. An Independent Judiciary

The popular election of judges is the most democratic form of judicial selection.[45] Merit selection advocates, however, boast that an appointment process provides an independent and more highly qualified

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non-partisan elections include: Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, and Wisconsin. *Id.* Michigan utilizes partisan elections to elect its Supreme Court, but uses non-partisan elections to elect its Court of Appeals and Circuit Courts).

39. *Id.* (These states include: Arizona (Superior Courts in counties with populations under 250,000); California (Superior Courts); Florida (Circuit Courts); Indiana (various Circuit and Superior Courts); Kansas (Fourteen [of thirty-one] District Courts); Missouri (Circuit Courts except in five counties); New York (Supreme Courts and County Courts); Oklahoma (District Courts); South Dakota (Circuit Courts); and Tennessee (Chancery Courts, Criminal Courts, and Circuit Courts)).

40. *Id.* (Sixteen other states also hold retention elections, but the retention elections in those states are for judges who were appointed to the bench through the merit selection system).

41. The Federalist Society for Law and Public Policy Studies, *Judicial Selection White Papers: The Case for Partisan Judicial Elections*, *available at* http://www.fed-soc.org/Publications/White%20Papers/judicialelection.htm (last visited 4/278/2004).

42. Malia Reddick, *Symposium: Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 730-33 (2002), *citing* RICHARD A. WATSON & RANDAL G. DOWNING, THE POLITICS OF BENCH AND BAR (1969).

43. American Judicature Society, *Judicial Selection in the States: Initial Selection, Retention, and Term Length*, January 2004, *available at* http://www.ajs.org/js/SelectionRetentionTerms.pdf (last visited April 28, 2004).

44. *See, e.g., Symposium: Selecting Judges in Pennsylvania*, 106 DICK. L. REV. 679 (Spring 2002); *Symposium on Judicial Elections*, 30 CAP. U.L. REV. 437 (2002).

45. *See* Reddick, *supra* note 42, at 729; Julius Uehlein & David H. Wilderman, Esq., *Why Merit Selection Is Inconsistent with Democracy*, 106 DICK. L. REV. 769 (2002).

judiciary than can be attainable through the popular election of judges.[46] This assertion is false.[47]

Notably, the merit selection system often requires the governor or the legislature to appoint or give final approval for a judicial candidate.[48] Undeniably, governors and legislators are influenced by politics. Even in systems where judicial candidates are chosen by a nominating commission, politics still play a significant role in the nomination process, albeit in a less public forum.[49]

In merit selection systems, which generally use nominating commissions, it is likely that selection committee members will attain their post through some political process.[50] Richard A. Watson and Randal G. Downing have studied the effects of twenty-five years of merit selection in Missouri.[51] They found that "political influences were present in the selection of both lawyer and lay commissioners."[52] In the appointment of lay commissioners, Watson and Downing found that the commissioners were likely to be from the same political party as the governor.[53] Moreover,

> [i]n the process of selecting lawyer members of the nominating commissions, attorneys tended to split into two groups [plaintiffs'

46. American Judicature Society, *Merit Selection: The Best Way to Choose the Best Judges*, *available at* www.ajs.org/selection/ms_descrip.pdf (last visited Dec. 22, 2003); *see also* Pennsylvanians for Modern Courts, *Merit Selection: Commission-Based Appointments*, *available at* http://www.pmconline.org/merintro.htm (last visited Oct. 8, 2003).

47. *See* Reddick, *supra* note 42, at 744 (analyzing social scientific research on the merit selection system and concluding that merit selection does not make judges more independent or accountable to the public).

48. J. Andrew Crompton, *Pennsylvanian's Should Adopt a Merit Selection System for State Appellate Court Judges*, 106 DICK. L. REV. 755, 763 (2002) (describing the merit selection process and stating that the Governor makes the final selection of judges from a list comprised by a nominating commission); see also Pennsylvanians for Modern Courts, *Merit Selection: Commission-Based Appointments*, *available at* http://www.pmconline.org/merintro.htm (last visited October 8, 2003). Governors also directly appoint judges in California, Maine, New Hampshire, and New Jersey. American Judicature Society, *Judicial Selection in the States: Initial Selection, Retention, and Term Length*, January 2004, *available at* http://www.ajs.org/js/SelectionRetentionTerms.pdf (last visited April 28, 2004). Legislatures appoint judges in South Carolina and Virginia. *Id.*

49. *See infra*, notes 50-60 and accompanying text.

50. Reddick, *supra* note 42, at 732-34.

51. The Federalist Society for Law and Public Policy Studies, *Judicial Selection White Papers: The Case for Partisan Judicial Elections*, *available at* http://www.fed-soc.org/Publications/White%20Papers/judicialelection.htm, (last visited 1/8/2004). The authors of this article cite to: RICHARD A. WATSON & RANDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR (1969). *Id.*

52. Reddick, *supra* note 42, at 732 (*citing* RICHARD A. WATSON & RANDAL G. DOWNING, THE POLITICS OF BENCH AND BAR (1969)).

53. *Id.*

> lawyers and defense lawyers], much in the manner of a traditional two-party system. Far from bringing more []professional values to bear on the selection process, the attorneys tended to focus on more tangible selection criteria, in particular the socioeconomic interests of their clients.[54]

Accordingly, the goal of the Missouri Plan to take politics out of the judicial selection process has backfired. In practice, the Missouri Plan replaced the usual open politics associated with general elections with the closed-door politics of bar associations and executive appointments, in which the general population has no voice.[55]

Further, a recent article by Dr. Malia Reddick[56] claims that politics play a large role, not only in the selection of committee members, but also in the commission's deliberation process.[57] She cites two studies which reveal that one-third to one-half of commissioners interviewed stated that political considerations were introduced in deliberations, and that such considerations influenced their choices for judicial nominations.[58] Citing the Watson and Downing study, Dr. Reddick reveals that commission members use "panel stacking" and "logrolling" tactics to choose judicial candidates.[59] "Panel stacking" is when a nominating commission's list of nominees is fixed so that there is no real choice for the appointing authority to make.[60] "Logrolling" occurs when individual commission members cut deals with other commission members to support their respective nominees.[61]

Judgeships are political positions. Most scholars recognize that the law is synonymous with politics and that judges make political choices when they make decisions.[62] Research has shown that "the Missouri Plan substitutes committee politics for electoral politics. The appearance of expertise and non-partisanship is largely, if not entirely, a façade."[63] Given the role judges play in politics, should not the citizenry be entitled to vote for their preferred candidate?

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54. *Id.*
55. *Id.*
56. Reddick, *supra* note 42, at 733 (Dr. Reddick is the Director of Research for the American Judicature Society).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. Armitage, *supra* note 3, at 638, (*quoting* Peter D. Webster, *Selection and Retention of Judges: Is there One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 4 (1995)).
63. The Federalist Society for Law and Public Policy Studies, *Judicial Selection White Papers: The Case for Partisan Judicial Elections, available at* http://www.fed-soc.org/Publications/White%20Papers/judicialelection.htm, (last visited 1/8/2004).

C. *An Impartial Judiciary*

Citizens who elect judges on the basis of the information gained from that candidate's campaign can expect those judges to remain impartial after they are elected. Under the Pennsylvania Code of Judicial Conduct, a candidate is prohibited from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[64] Although merit selection proponents claim that judicial candidates compromise their impartiality and independence by taking positions on issues to which they must be neutral when on the bench,[65] the United States Supreme Court disagrees.[66] A candidate that announces his or her views on particular issues is not bound to maintain that position after the election.[67] "We know that 'announcing . . . views' on an issue covers much more than promising to decide an issue a particular way."[68]

It is difficult to see the dichotomy that merit selection proponents are intent on drawing between merit selection and judicial elections with respect to judicial independence and impartiality. Merit selection advocates claim that selection committees would consider judicial nominees based on their experience, training, leadership, scholarship, public service, and temperament.[69] If the members of the nominating committee are looking at these factors, the potential judicial nominee's politics will surely shine through. A judicial nominee's personal politics are thus important to their nomination and approval. To confirm this proposition, one needs only to watch C-SPAN during a judicial confirmation hearing.

Admittedly, politics cannot be removed from judicial selection regardless of the process used to choose judicial candidates. Nevertheless, the flaws in the election system are eclipsed by the injustices of the so-called merit selection system. Moreover, the problems in the election system can be remedied.[70]

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64. PA. CODE OF JUDICIAL CONDUCT, Canon 7(B)(1)(c) (2003).

65. Pennsylvanians for Modern Courts, *Merit Selection: Commission-Based Appointments*, *available at* http://www.pmconline.org/merintro.htm (last visited October 8, 2003).

66. *See* Republican Party of Minn. v. White, 536 U.S. 765, 781-82 (2002).

67. *Id.* at 770.

68. *Id.*

69. Pennsylvanians for Modern Courts, *Merit Selection: Commission-Based Appointments*, *available at* http://www.pmconline.org/merintro.htm (last visited Oct. 8, 2003).

70. *See infra*, Part IV.

D. A Qualified Judiciary

Merit selection advocates argue further that the merit selection process is more democratic than election systems because selection committees can make informed choices based on reliable rational research and thorough information, whereas in a popular election, voters are destined to make uninformed and unqualified decisions.[71] The claim is that judicial candidates are limited to statements like, "I believe in law and order" when campaigning,[72] and therefore, voters are not capable of gaining real information about a candidate from their campaigns. This is erroneous. Voters are no less informed in judicial races than they are in legislative or executive election races.

Moreover, voters have the capacity to make intelligent and informed decisions in judicial races, as they have increased access to a variety of media outlets, including: newspapers, television, radio, and the internet. Furthermore, judicial candidates are not confined to generic statements to bolster their positions. In *Republican Party of Minnesota v. White*,[73] the United States Supreme Court held that judicial candidates may voice their opinions on issues of political and legal dispute.[74] Newly elected Pennsylvania Supreme Court Justice, Max Baer, took full advantage of this ruling in his 2003 campaign. While campaigning, Baer voiced his opinion on abortion, tort reform, the death penalty, gun control, and labor unions.[75] During the campaign, Baer and his opponent, Joan Orie Melvin, ran two million dollars worth of advertisements on television.[76] Notably, Melvin chose not to voice her opinions on legal and political issues.[77] In the end, voters chose the candidate with whom they were more informed and whose stated politics reflected their own.

Merit selection proponents cannot show that nominating commissions appoint more qualified judges than those elected by the

71. American Judicature Society, Merit Selection: The Best Way to Choose the Best Judges, *available at* www.ajs.org/selection/ms_descrip.pdf (last visited December 22, 2003); *see also* Pennsylvanians for Modern Courts, Merit Selection: commission-Based Appointments, *available at* http://www.pmconline.org/merintro.htm (last visited October 8, 2003).

72. Pennsylvanians for Modern Courts, *Merit Selection: Commission-Based Appointments*, *available at* http://www.pmconline.org/merintro.htm (last visited Oct. 8, 2003).

73. 536 U.S. 765 (2002).

74. *White*, 536 U.S. at 788 (stating that "[t]he Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment").

75. Emily Heller, *He Speaks on Issues, Wins State Court Seat; The Election Tested the New Right to Take Stands*, THE NATIONAL LAW JOURNAL, Nov. 10, 2003, at 7.

76. *Id.*

77. *Id.*

people.[78] Not only are appointed judges just as likely to have political careers as elected judges, but studies have shown that there are relatively no differences in qualifications between appointed and elected judges.[79] After researching the qualifications of judges chosen under the Missouri Plan, political scientist Harry Stumpf found no support for claims that merit selection candidates were better educated than elected judges, more open-minded than elected judges, or had more judicial experience than elected judges.[80] Accordingly, if merit selection does not produce judges more qualified than those elected by the people, why would a democratic society remove the citizen's role?

IV. Improving the Election System

This article does not suggest that the election system is flawless. Like all popular election systems, a judicial election system will "not [be] foolproof, nor [will] it [be] perfect . . . the democratic process by its very nature, is anything but perfect."[81] Campaign finance and inequalities in the voting process are two of the primary concerns of the Pennsylvania judicial election system. These problems, however, are inherent in the democratic form of government and can be resolved without shifting paradigms. There is no need to resort to the implementation of an entirely new mode of judicial selection.

A. Campaign Finance

Campaigning is one area of the election system that has been nationally criticized, particularly in relation to campaign finance and political advertising.[82] Reform in Pennsylvania and other states is necessary.

Recently, the United States Supreme Court reviewed the Bipartisan Campaign Reform Act of 2002, also known as the McCain-Feingold Bill.[83] The Court upheld statutory restrictions on soft money contributions and limitations on political advertising.[84]

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78. The Federalist Society for Law and Public Policy Studies, *Judicial Selection White Papers: The Case for Partisan Judicial Elections*, *available at* http://www.fed-soc.org/Publications/White%20Papers/judicialelection.htm, (last visited Jan. 8, 2004).

79. Reddick, *supra* note 42, at 741-42.

80. *Id.*

81. The Honorable Judge John P. Hester, Testimony at Pennsylvania Senate Hearing in Pittsburgh regarding a proposed Constitutional Amendment to establish a merit selection system (transcript on file with author).

82. The Reform Institute for Campaign and Election Issues, *Reform for Judicial Elections & Selection*, *available at* http://reforminstitute.org/cgi-data/issues/files/2.shtml (last visited April 30, 2004).

83. 2 U.S.C. § 431 (2002).

84. McConnell v. FEC, 124 S. Ct. 619, 718-19 (2003).

The constitutionality of the reform provisions in the McCain-Feingold Bill stands as a testament to the possibilities of reform. Pennsylvania's legislature, along with the other state legislatures, should consider similar legislation to reform judicial elections. These reform measures are easily implemented and would significantly help to remove the conflict which exists where judicial campaigns receive contributions from the same people, parties and attorneys, who later appear before them.

Campaign financing for judicial elections should also provide that monetary contributions be channeled through a state bar association, which would have the responsibility of distributing the money equally to each candidate. In addition, Pennsylvania should consider creating a general campaign fund for judicial elections that would be similar to the one used in presidential election campaigns.

B. The Voting Process

The voting process is another aspect of the election system in need of repair. The 2000 presidential election exposed flaws in voting systems across the country, and these problems apply with equal force to the election of judges at the state level. In Pennsylvania, judicial elections are burdened with problems such as ballot position and name recognition. Regional domination presents another weakness, as most judges elected to the appellate bench in Pennsylvania come from the greater Philadelphia and Pittsburgh regions.[85]

These concerns, however, can be addressed. Simultaneous drawings for ballot positions in all counties, rotating positions in counties across the state, and random drawings for ballot positions are some possible solutions. The Election Code could also be amended to prevent apathetic judicial candidates from playing "Judicial Roulette," where candidates file for election in the hopes of getting a good ballot position, only to withdraw if their position turns out to be poor. Further, regional domination may be alleviated if a candidate's county of origin is not

85. Five of the Seven justices on the Pennsylvania Supreme Court come from the greater Philadelphia and Pittsburg regions. Pennsylvanian's for Modern Courts, *Pennsylvania's Appellate Judges*, *available at* http://www.pmconline.org/appjudge.htm (last visited April 30, 2004) (Allegheny County—2; Philadelphia County—2; Montgomery County—1; Cumberland County—2). Thirteen of the fifteen judges on the Pennsylvania Superior Court come from the Philadelphia and Pittsburgh regions. *Id.* (Allegheny County—7; Philadelphia County-2; Butler County—1; Montgomery County—1; Northampton County—1; Westmorland County—1; Luzerne County—1; Erie County—1). Finally, eight of the nine judges on the Commonwealth Court of Pennsylvania are from the greater Philadelphia and Pittsburgh areas. *Id.* (Allegheny County—4; Philadelphia County—1; Montgomery County—1; Northampton County—1; Lehigh County—1; Dauphin County—1).

indicated on the ballot. Such proposals can be adopted relatively easily without a constitutional amendment and would effectively counter some of the most vehement concerns of election system opponents.

V. Conclusion

A. Judicial Elections Provide Balance to Government

Judicial elections give a democratic voice to the citizenry, thereby fulfilling a fundamental tenet of democracy, the requirement of checks-and-balances. Why should judicial selection differ from the selection systems for the executive and legislative branches? As with presidential and legislative elections, voters can bear responsibility for researching the candidates who run for judicial seats and for voting conscientiously. By doing so, judges, like other elected officials, become directly accountable to the people. This form of accountability prevents one branch from having too much influence on another. Without judicial elections, there would be an imbalance among the three branches.

In an election system, the balance of power is maintained because the judges "check" the legislature through their power to declare laws unconstitutional. Likewise, the legislature checks the judiciary by establishing courts and passing laws. The executive, in turn, checks the judiciary through oversight, while the judiciary checks the executive through judicial interpretation. Most importantly, all branches are held accountable by citizens who vote to elect the members of each branch. This latter "check" on civic leaders is absent from the merit selection approach.

Merit selection advocates argue that after an appointed judge has served his term he may face a retention election, which would provide a level of accountability to the public. Political science research, however, indicates that appointed judges facing retention elections are re-elected at a higher rate than judges elected in partisan elections.[86] This is a result of very low voter turnout for retention elections, the judge running unopposed, and the judge not identifying with a particular party.[87] Accordingly, merit selection retention elections do not truly hold appointed judges accountable to the populace. Partisan elections, in

86. The Federalist Society for Law and Public Policy Studies, *Judicial Selection White Papers: The Case for Partisan Judicial Elections*, *available at* http://www.fed-soc.org/Publications/White%20Papers/judicialelection.htm, (last visited April 27, 2004); *see also* Reddick, *supra* note 42, at 739-40.

87. The Federalist Society for Law and Public Policy Studies, *Judicial Selection White Papers: The Case for Partisan Judicial Elections*, *available at* http://www.fed-soc.org/Publications/White%20Papers/judicialelection.htm, (last visited April 27, 2004).

which candidates compete for votes, provide more accountability because the voters' choices are valuable. Their voices are much more than a rubber stamp.

Unlike merit selection, a judicial election system offers a democratic, representative, and efficient form of judicial selection. It provides judicial accountability while maintaining independence and impartiality. Without judicial elections, citizens are likely to become disenchanted with the legal system because they are not directly involved. At best, commissions can attempt to represent the wishes of the people. At worst, commissions represent special interest groups and are a means to pay political favors. Citizens are given no real choice.

B. Closing Comments

Popular elections preserve the right of each eligible citizen to vote for those who will serve him or her by applying the laws that govern all citizens. The people's right to elect those by whom they are to be judged is the "very touch-stone in the foundation of the democratic process."[88] The judicial election system maintains these long-cherished principles by holding the state judges responsible to the people of the state, providing judicial accountability, neutrality, and independence.

This article has shown that the arguments advanced by merit selection proponents are thin. Merit selection does not offer greater accountability, as judges are rarely removed in low-voter-turnout retention elections. Merit selection does not allow for more neutral judges, as the election process safeguards against conflicts of interest. Also, merit selection does not provide for greater judicial independence, as judges are chosen based on political motivations.

In an election system, politics play a role, but the political influence originates with the people. This is the very definition of democracy. Merit selection advocates seek to remove social responsibility from citizens by placing it in the hands of the few. Their position is reminiscent of an aristocracy. Therefore, judges should be chosen by voters in a popular election.

Finally, I am aware that the Pennsylvania Bar Association (PBA) favors a merit selection system.[89] Its support for such a system, however, is advocated by the leadership of the association and not by its

88. The Honorable Judge John P. Hester, Testimony at Pennsylvania Senate Hearing in Pittsburgh regarding a proposed Constitutional Amendment to establish a merit selection system (transcript on file with author).

89. Reginald Belden, Jr., *The Winning Ticket for Future Judicial Races*, Pennsylvania Bar Association, *available at* http://www.pabar.org/prnov01winning.shtml (last visited May 4, 2004).

membership.[90] The PBA should take the temperature of its entire membership concerning this important issue through secret ballot. This paper demonstrates that only through democratic methods can the will of the people be heard.

90. *Id.*