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Politics in the Sunlight: The Benefits of an Elected Judiciary

Texas' method of selecting a judiciary is a recurring topic of debate. Article V, Section 2 (c) of the Texas Constitution provides for the direct election of state judges. The Constitution reads:

“...Justices shall be elected (three of them each two years) by the qualified voters of the state at a general election...”

Texas is one of five states in which judges above the municipal level¹ are selected by partisan elections² (the others being Alabama, Louisiana, Ohio, and West Virginia.) Thirteen other states use non-partisan elections to select their judges, meaning that a total of eighteen states operate with entirely elected judiciaries, have no form of retention election, and utilize executive appointment or legislative selection only in rare circumstances³.

The propriety of the current system, an elected judiciary, is often questioned and its merits debated. Bills to alter this fundamental constitutional structure have been filed in

¹ In Texas, this means the State Supreme Court, the Court of Criminal Appeals, the Court of Appeals, and all district courts, but other states employ variations on this nomenclature.

² The only exception to this in Texas occurs if a judge vacates his seat before his term ends, in which case a replacement is appointed, dependent on the level of the court, by either county commissioners, mayors or city councils, or the Governor (with the consent of the Senate); <http://texaspolitics.laits.utexas.edu/html/just/0404.html>

³ For a complete analysis of judicial selection procedures in each state, please refer to “Judicial Selection in the States: Appellate and General Jurisdiction Courts,” published in 2004 by the American Judicature Society; http://www.ajs.org/selection/sel_stateselect.asp

the last two regular sessions. Senate Bill 553 (79R) filed by Senator Robert Duncan would have introduced an appointment and retention election system, and Senate Joint Resolution 16 (79R), also authored by Senator Duncan, would have amended the Texas Constitution to provide for appointment and retention elections. Senator Duncan filed similar bills during the 78th Legislature, with House companions being filed by Representative Elizabeth Ames Jones⁴.

It is contended that an elected judiciary is more susceptible to political pressure and the negative influences of candidate fundraising on judicial decisions. For example, the Senate Research Center's Analysis of S.B. 794 (78R), which would have introduced an appointment/retention system, pointed out that:

“In the current system, there are only two ways to become well known to the electorate--raise and spend money, or speak out on specific issues. This may place greater pressure on elected judges to commit to policy positions during their campaigns.”⁵

As a consequence, some advocate selection and retention to take the place of the existing system of direct election. Under this proposed selection and retention system, state judges would be appointed, much like federal judges. The appointed judges in Texas, however, would be assigned terms and be subjected to a vote of the people; the electorate could retain the judge for another term or vote the judge out, only to have another one appointed.

The overarching problem with the retention system of judicial selection is that, unlike our election system, judges are removed from the people, which is in direct conflict with the state constitution, sound conservative principle, and largely ignores the experience of similar systems at the federal and state level.

Elected vs. Appointed

Justice at Stake, an organization that advocates judicial selection and retention, affirmatively quotes two members of the bench:

"The law makes a promise---neutrality. If the promise gets broken, the law as we know it ceases to exist."

- Supreme Court Justice Anthony M. Kennedy

"Judicial independence is the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing."

- Tennessee Supreme Court Justice Adolpho A. Birch, Jr.

The two ideas posited by Justice Kennedy and Justice Birch – independence and neutrality-- form the core of thinking in defense of judicial selection and retention over

⁴ These were SB 794 and SJR 33 (by Duncan), and HB 1511 and HJR 63 (by Jones).

⁵ Senate Research Center, Analysis of S.B. 794 (78R).

the current system of direct election of judges in Texas (and other states). The American Bar Association Standing Committee on Judicial Independence offers its views on independence and neutrality.

The ABA argues that:

“A judge's impartiality and ability to interpret and apply the laws fairly are integral to the administration of justice. That impartiality, though, is called into question when political pressure is brought to bear on a judge in order to assure a particular ruling.”

However, one need only consider four of the worst decisions by the United States Supreme Court to appreciate the problems associated with appointed judiciaries (of which the selection and retention system is merely a variant):

- *Dred Scott v. Sandford* (1857);
- *Plessy v. Ferguson* (1896);
- *Roe v. Wade* (1973) [also, *Griswold v. Connecticut* (1965)]; and,
- *Kelo v. City of New London* (2005).

In *Scott*, the Supreme Court ruled against Dred Scott and his family's petition to become free. “In 1846, Dred Scott and his wife Harriet filed suit for their freedom in the St. Louis Circuit Court. This suit began an eleven-year legal fight that ended in the U.S. Supreme Court, which issued a landmark decision declaring that Scott remain a slave⁶.”

In *Plessy v. Ferguson* (1896), “...Justice Billings Brown asserted that distinctions based on race ran afoul of neither the Thirteenth nor Fourteenth Amendments, two of the Civil War amendments passed to abolish slavery and secure the legal rights of the former slaves⁷.”

In *Roe*, even “pro-choice” advocates have argued that the ruling was based not on a sound reading and interpretation of the U.S. Constitutional, but instead was mired in social policy. Seven Supreme Court justices found a right to privacy in the Constitution, superseding Congress and state legislatures by legalizing abortion in all 50 states.

Most recently, in *Kelo*, five Supreme Court justices voted to allow a Connecticut city to forcibly take private residences by eminent domain and transfer the property for private development. The justices cited economic development, including an increased tax base for the City of New London, as a legitimate interpretation of “public use”. The public outcry and ensuing anti-*Kelo* legislation across the nation raise the question: what would have been the fate of the five majority justices at a hypothetical election?

⁶ “The Dred Scott Case,” Washington University in St. Louis; <http://library.wustl.edu/vlib/dredscott/>

⁷ “Introduction to the Court Opinion on the *Plessy v. Ferguson* case,” Information USA, US Department of State.

The continuance of legally enforced racism by the Supreme Court in *Plessy* should amply demonstrate that appointed judiciaries can act contrary to moral principle, and decide against the interests of fundamental human rights. Moreover, that seven justices can find a new right in the Constitution, or that five justices would transfer a family home to a private corporation, belies arguments of the superior outcomes derived from an appointed judiciary.

This is not to argue that appointed judges are necessarily less able or capable arbiters than elected judges, but is simply to point out that because they are not elected, they are largely insulated from any meaningful accountability to the people. What compounds the problems raised by these reproachable decisions is that the Supreme Court, an appointed body, is wholly immune to redress except under the most extraordinary circumstances – Article II, Section 4 of the Constitution permits “civil officers of the United States” to be removed from office only by “impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.” Therefore, Supreme Court justices, as well as other appointed judges, will remain on the bench regardless of the opinions they render and the adverse impact those opinions have on the body politic.

At the state level, one must look no further than the debacle created by the Florida Supreme Court when it ordered a statewide recount of votes in the 2000 Presidential election. The Court’s decision, which was overturned by the U.S. Supreme Court, attracted much criticism:

“[T]he Florida court's departure from traditional judicial practice, in which remand orders are scrupulously obeyed, unfortunately mirrored the very arguments with which Bush attorneys sought, and won, reversal — and the Presidency... The [U.S. Supreme Court] Justices might have wondered why a court that did not seem to respect a higher court's commands would faithfully honor the wishes of the state legislature in interpreting its laws, and its intent.”⁸

Despite these criticisms, since the Florida Supreme Court is appointed, voters had no opportunity to reject or endorse the Supreme Court Justices who ruled in the two *Gore vs. Harris* decisions. The two cases make an extremely compelling argument for an elected judiciary since the decisions directly impacted Floridians votes for the nation’s chief executive.

It is equally notable that in overturning the decisions of the Florida Court, the U.S. Supreme Court, another appointed body, had a similarly profound impact on the votes cast in Florida. Analyzing the long term impact of the Supreme Court’s *Bush v. Gore* decision, a *New York Times* editorial in August 2006 argued that:

“The majority opinion announced that the ruling was ‘limited to present circumstances’ and could not be cited as precedent... It undermines the courts’

⁸ “How the Florida Supreme Court Insulted the U.S. Supreme Court – And May Have Inadvertently Crowned President Bush,” FindLaw.com, December 15, 2000; <http://writ.news.findlaw.com/hilden/20001215.html>

legitimacy when they depart sharply from the rules of precedent, and it gives support to those who have said that *Bush v. Gore* was not a legal decision but a raw assertion of power.”⁹

Regardless of whether the Florida Court was ultimately correct to order recounts, or whether the U.S. Supreme Court ruled correctly to halt the recounts, allowing appointed bodies to have such an impact on citizens’ votes is contrary to the founding principles of our democratic republic.

An Election of One

Retention elections have the minor salutary appearance of voter participation, but an election of one can hardly be called an election. Indeed, elections are generally most productive and beneficial when they are hotly contested and closely decided because they amplify the competing interests that are integral to a functioning, healthy representative democracy. Competition is essential. Furthermore, lack of competition aside, academic research by political scientist Mary Volcansek points out significant flaws in the retention-election system:

“Prominent characteristics of retention elections are low voter interest, knowledge, and turnout. The absence of voter cues (i.e., party identification) in retention elections is more striking than in other judicial elections. Voters thus choose to support incumbents, even in the presence of active media campaigns detailing deeds of misconduct or incompetence. Less than one percent of all judges standing for retention elections have been removed through that process [citing a 1980 study] ¹⁰.”

The lack of participation in retention elections ought to be cause for concern for anyone familiar with the electoral process. Low voter turnouts invariably mean that special interests of all ideological stripes are dominating the election, thereby increasing – not decreasing – both the politicization of the courts and the imperative of money to flow into the system.

The impetus of the term limits movement, which came to fruition during the early 1990s, arose precisely because election outcomes, particularly at the Congressional level, had become too predictable and were largely decided before the election cycle commenced. Indeed, in the 2004 election cycle, 401 members of the U.S. House of Representatives sought re-election, and 396 (or 99%) were successful. On the Senate side, only one of the 26 senators up for re-election was defeated (which translates to a 96% re-election rate.)¹¹ These statistics underscore the point that Congressional re-election campaigns are very similar to retention elections in that the incumbent is rarely rejected by voters.

⁹ “Has *Bush v. Gore* Become the Case That Must Not Be Named?” *New York Times* editorial, August 15, 2006.

¹⁰ “The Case for Partisan Judicial Elections,” Judicial Selection White Papers, Federalist Society, 2002.

¹¹ “Why are sitting members of Congress almost always reelected?”, *ThisNation.com*;
<http://www.thisnation.com/question/016.html>

This lack of competition in Congressional elections is reflected by the low turnout that they typically generate. U.S. Congressional elections generally have significantly lower turnouts than similar legislative elections in other developed democracies¹².

Without competition, voters turn apathetic. Apathy is anathema to democracy. When the outcome is predetermined, as they are in the overwhelming majority of retention elections (like Congressional races), voters will be disinterested except when there happens to be the occasional ruling that scandalizes public opinion. That, too, will rarely happen except when special interests opposing the retention of certain judges raise and expend money in the effort to defeat the judge undermining one of the tenets of retention election proponents – namely that judges will not be politically motivated on the bench.

The Role of Independence in the Judiciary

Proponents of the appointment system argue that politics are at least further removed from the nomination and confirmation process than from direct elections. The Federalist Society points out that:

“It thus appears impossible to remove ‘politics’ from judicial selection, regardless of the method used, where “politics” is understood as including the agendas of interest groups most notably the bar -- with a particular stake in the judicial selection process...Professor Stumpf puts the point more forcefully: ‘The most persistent finding that emerges from the research is that the forces and influences at work in the process seem to have a way of making themselves felt irrespective of the specific selection mechanism.’”¹³

Many suggest that the amount of money donated to judicial candidates over the course of an election compromises the objectivity of the elected judiciary, making the process and, indeed the justices, more political and more prone to legislating from the bench. Former Chief Justice of the Texas Supreme Court Thomas R. Phillips, has stressed that “my biggest regret is that we are still using the partisan contested high dollar method of choosing judges and a decade ago I didn’t think we would be.”¹⁴ However, referring to donations to judges’ electoral campaigns, Chief Justice Phillips points out that:

“[I]n most of the cases we get, either both sides are contributors or neither side is. If the case is a business dispute that comes from a large city in Texas with the clients represented by large firms, generally both sides will have contributed to the campaigns of all the justices up here. If it's a family law dispute from a small town in Texas or it's a boundary dispute over a piece of land in rural Texas, it's very unlikely that either client or either lawyer will have been involved in Supreme Court politics. And so it's simply not a case very often where you have a

¹² “The Demographics of Voting in America,” Population Resource Center;
<http://www.prcdc.org/summaries/voting/voting.html>

¹³ “The Case for Partisan Judicial Elections,” Judicial Selection White Papers, Federalist Society, 2002

¹⁴ Interview with Tom Phillips, PBS.org;
<http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/phillips.html>

close friend and a good supporter in the court against somebody who's done all they could to defeat you.”¹⁵

It is unlikely, therefore, that any of the present or former Justices on the state bench could point to a decision that was made primarily for political reasons. In any case, to suggest that moving from an elected to an appointed judiciary would somehow remove or lessen the amount of money used to influence the process neglects to recognize that there are, and would continue to be, groups who use money to influence both the appointment and confirmation processes. Looking at the political response to President Bush’s nominations to the federal bench, there is clearly a well-organized effort to derail his nominees, including those to the United States Supreme Court.

One of the prominent forces working against the President’s nominations was People for the American Way (PFAW) and its related groups. The Capital Research Center (CRC) reported in its October 2002 bulletin that PFAW, a 501(c)(4), received \$5.1 million in contributions in 2000, and the affiliated People for the American Way Foundation, a 501(c)(3), received \$7.5 million in contributions in 2000. PFAW ran ads in the 2000 election reminding voters that judicial appointees have “forty years of influence over our freedoms,” while distinguishing between Bush and Gore and favoring a liberal-activist viewpoint. According to the group’s 2004 IRS filings, PFAW spent nearly \$1 million on “media production” in 2004. Most importantly, in 2004, PFAW spent \$8.8 million on “miscellaneous projects” which included a get out the vote campaign and “the Supreme Court Project”¹⁶.

Certainly, PFAW has a right to its agenda and advertising, or “issue education” spots, just as any other group, and PFAW makes no attempt to hide its left-leaning political orientation (CRC ranks it a 2 out of 8, with 1 being the most liberal¹⁷).

All of this points to a process that is highly politicized despite the absence of voting rights, leaving only these interest groups (as opposed to voters) with the funding to support or oppose a judicial appointment. To be clear, the only difference between judicial election and judicial appointment is the name on the check - one is to the candidate and the other to a political interest group that may support or oppose a nominee.

Interestingly, one of the other strong forces at work in Washington, and working against the President’s nominees is the Alliance for Justice. The Alliance for Justice’s Judicial Selection Project is self-described as follows:

“Since its inception in 1985, the Alliance's Judicial Selection Project has taken a leading role in efforts to ensure a fair and independent federal judiciary. The Project monitors judicial nominations at all levels of the federal bench. It

¹⁵ Interview with Tom Phillips, PBS.org;

<http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/phillips.html>

¹⁶ People for the American Way IRS Form 990 (P. 14 of the following:

<http://www.capitalresearch.org/admin/upload/uploads/org/PAW100/2004.pdf>)

¹⁷ Capital Research Center <http://www.capitalresearch.org/search/orgdisplay.asp?Org=PAW100>

encourages public participation in the selection and confirmation process and raises public awareness about the significant impact the federal judiciary has on the country. The Project promotes support for the nomination and confirmation of highly capable and fair judges who have demonstrated a commitment to equal justice.”

Presumably, the Alliance encourages public participation in the process only insofar as that participation does not involve voting, which would be among the most obvious methods of “public participation.” It stands to reason that without having to appeal to voters, these groups wield much greater power in the determining the makeup of the judiciary, and to that end, a system of appointment for judges increases the power of such special interest organizations. Money will continue to be a part of this process, and the focus should be on making the process as open as possible to public scrutiny. There is often little doubt as to what political ideology an individual interest group subscribes, though it is inappropriate to suggest that the appointment process would be any less political, or potentially corrupting, than the election process given the political persuasion of these groups.

Recent Experience: the Politics of Appointments in 2000 and 2004

Whether a candidate receives a contribution from an individual person or political action committee, or whether the contribution is made through a third-party advocacy organization, makes little difference as both seek to influence the process through their contribution. However, the decision of the voters ought to be paramount and to the extent that the advocacy organizations may be able to bring voters to their cause, the influence of these groups is allowable, but they should never replace the will of the people.

The 2000 and 2004 election cycles brought out left-leaning advocacy organizations, primarily Pro-Choice organizations, to raise the rhetoric about the imperative in electing a pro-choice President who would not threaten to overturn *Roe v. Wade*. On the correct assumption that the 43rd President would be in a likely position to make at least one appointment to the Supreme Court, the National Organization for Women and Planned Parenthood opposed President Bush because of attempts he might make to appoint pro-life judges to the bench. There is no doubt that this issue was politicized by candidates, Hollywood-activists, and other grassroots activists affiliated with these organizations, who urged people to vote according to the issue of abortion and their fear of Pro-life judges. The election of the President is clearly very closely tied to the type of judges that the President might appoint.

In addition, candidates for the United States Senate and House of Representatives were often asked to make their stance on the appointment of “liberal” or “conservative” judges known as a barometer for how they might vote in a confirmation process, or other similar circumstance. The politics of an appointment simply cannot be divorced from the politics of elections.

In fact, two failed Supreme Court appointments highlight political parties’ weight in the

process, despite the absence of an electoral process. The 1987 appointment of Judge Robert Bork by President Ronald Reagan, a Republican, illustrates that the opposition party (the Democrats, led by Senator Ted Kennedy) can successfully derail a judicial appointment.

Equally, as Cass R. Sunstein, Professor of Jurisprudence at the University of Chicago argues, Republican Senators in opposition during the Clinton administration attempted to overturn presidential judicial nominees:

“Under President Bill Clinton, Republican senators were equally single-minded. Showing little respect for presidential prerogatives, they did whatever they could to block Mr. Clinton's judicial nominees. Sometimes Republican senators justified their actions by labeling Clinton nominees as ‘liberal activists.’ Sometimes they offered no reasons at all in refusing to schedule confirmation hearings.”¹⁸

Alternatively, the 2005 nomination of Harriet Miers by President George W. Bush proves that the partisan opposition to a nominee need not come from the minority political party. In the case of Harriet Miers, Republicans successfully opposed Ms. Miers’ nomination by the Republican President.

There is little apprehension in identifying members’ political party with respect to their position on one of the President’s appointments, and both parties seem willing to be knowingly-split by party lines. A *Washington Post* article from March 5, 2003, for instance, quotes Senate Minority Leader Tom Daschle as saying, “I am confident that, regardless of how many votes are taken, our caucus is going to hold its position.” The threat of a Democratic filibuster has loomed over many of President Bush’s appointments, including the appointments of qualified judges such as Priscilla Own, Janice Rogers Brown, and William H. Pryor, Jr. In fact, both parties’ leadership does not hesitate in making the confirmation process political, with both Republicans and Democrats openly discussing the nominee’s supporters and opponents relative to their affiliation with a political party, and, as minority Leader Daschle pointed out, voting along those lines as well.

“...Protecting the Public from its own Naiveté.”

Whether a judiciary is entirely appointed, elected, or appointed with subsequent retention elections, there is no doubt that the process is political, and will remain so, regardless of what system is in place. The fundamental difference is that the voters have a resounding voice in the election process. With retention elections, their voice is lost in favor of interest groups that aggressively support or oppose a candidate.

Consider the view of Thomas Jefferson:

"The exemption of the judges from [election] is quite dangerous enough. I know no safe depository of the ultimate powers of the society but the people themselves;

¹⁸ “Tilting the Scales Rightward,” Cass R. Sunstein, *The New York Times*, April 26, 2001.

and if we think them [the people] not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it [power] from them, but to inform their discretion by education¹⁹."

Voter choice was the issue at stake with respect to adoption of the Seventeenth Amendment to the U.S. Constitution, which led to the direct election of United States Senators. The following analysis of the ratification of the Seventeenth Amendment highlights clear parallels between the direct election of Senators and the rationale behind retaining an elected judiciary:

"The ratification of this Amendment was the outcome of increasing popular dissatisfaction with the operation of the originally established method of electing Senators. As the franchise became exercisable by greater numbers of people, the belief became wide-spread that Senators ought to be popularly elected in the same manner as Representatives. Acceptance of this idea was fostered by the mounting accumulation of evidence of the practical disadvantages and malpractices attendant upon legislative selection, such as deadlocks within legislatures resulting in vacancies remaining un-filled for substantial intervals, *the influencing of legislative selection by corrupt political organizations and special interest groups* [emphasis added] through purchase of legislative seats, and the neglect of duties by legislators as a consequence of protracted electoral contests."²⁰

To vacate our elected judiciary would constitute a retreat from the fundamental premise that the people are better arbiters of political events than elites such as the State Bar, whose influence would increase tremendously under a selection and retention system. The influence of the American Bar Association on federal nominees was overweening and led to a tilting of the judiciary to the left.

The 17th Amendment was a progressive move toward a resounding public voice in the affairs of the United States Senate.

The system of elections has served the American people well. To the extent that elections (and fundraising) are unsavory activities, governance by unaccountable elites is still less savory. Justice Robert Young of the Michigan Supreme Court, underscored this point when he argued that:

"As someone who was the target of some fairly vicious campaign ads, I can honestly say that I have a very personal understanding of how ugly and unsettling some of these election tactics can be. But our republic -- and our judiciary -- is healthy. And its health is sustained whenever the public is treated to a robust

¹⁹ Thomas Jefferson, Writings, Vol. XV, p. 278

²⁰ FindLaw.com annotations to the Seventeenth Amendment to the United States Constitution; <http://caselaw.lp.findlaw.com/data/constitution/amendment17/>

discussion of the issues, no matter how unseemly it may appear to elites who purport to be concerned about protecting the public from its own naiveté.”²¹

Conclusion

Regardless of whether a judiciary is appointed or elected, the process is either covertly or overtly political. Efforts to take the politics out of either process will fail by only shifting the politics from the transparency afforded by elections and into the shadows. This only raises the imperative that the process be open and honest with public involvement, rather than led by narrow interest groups that may not represent the majority of the people. In debating the issue of an elected judiciary versus an appointed judiciary, the point that the election process is the most democratic and representative of the people cannot be underscored enough.

Opposition to judicial selection rests on a basic belief in the electoral system – that over time and in most cases the system works extraordinarily well and has insulated the state and country from extremism. On the contrary, as Justice Robert Young, has argued, “...most such reforms [i.e. judicial selection] are fundamentally rooted in a total distrust of the public and its ability to make astute political judgments....”²²

In Texas, the right of the people to have the ultimate say in their form of government – including over those who must interpret the law – is enshrined in the Texas Constitution. Article I, Section 2 reads:

“All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.”

Texas voters have elected their judges for 153-years. The retention system acts a gatekeeper allowing only those individuals who are initially appointed to be re-elected to their position, which is antithetical to democratic values and the historical rights of voters in the state of Texas. There is no doubt that the voting public would remove a court that did not represent the political will of the people, just as it may vote to switch the party in power, but it is important that the people have the unfettered ability to exercise the right to vote for the judges that interpret laws and make important judicial decisions that impact Texas.

²¹ “Judicial Elections: Past, Present, Future,” Center for Legal Policy at The Manhattan Institute, April 18, 2001, Justice Robert Young, Michigan Supreme Court

²² Ibid.