Judicial Selection in Michigan - Time for a Change?

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Judicial Selection

Judicial Selection in Michigan—Time for a Change?

By John W. Reed

ow are we to choose those who judge us? To whom do we entrust the responsibility of protecting our liberties and the power to determine our rights and liabilities? We look for men and women of integrity, diligence, legal ability, and judicial temperament, chosen by methods that balance judicial independence and public accountability.

Michigan has an elected judiciary, although almost half of our sitting judges reached the bench initially by gubernatorial appointment to fill interim vacancies. This hybrid method of judicial selection and retention has been in place, essentially unchanged since the adoption of the Constitution of 1850, having been last restated in the Constitution of 1963. In the rapidly changing third of a century since 1963, many of our sister states have altered their methods of judicial selection. Almost all of the changes have been designed to increase the likelihood of choosing judges of high competence and to decrease the role of special interests in selecting them.

The mere fact that other states have changed is not by itself sufficient reason to change Michigan’s selection system. But if changes are to be recommended, they should be based on substantial public consensus. Accordingly, the State Bar’s Standing Committee on Judicial Selection believes that the Legislature should direct the appointment of a bipartisan citizens’ commission to study “the manner in which Michigan judges are selected” and to report on “the need, if any, to change [it], in whole or in part.” [The full text of the standing committee’s report to the Representative Assembly accompanies this article—Ed.]

The report simply recommends that Michigan’s judicial selection methods be studied; it does not suggest conclusions that should be reached. But in making its recommendation, the Standing Committee on Judicial Selection was moved by commonly voiced criticisms of present practice, summarized in its report.

QUALIFICATIONS

The only eligibility requirements for being a Michigan judge are that the person:

- Be a qualified voter of the jurisdiction in which office is sought;
- Be actively licensed to practice law in Michigan;
- Be less than 70 years old at the time of election or appointment; and
- Hold no office in a political party.

Nothing in the way of experience or demonstrated ability is required. A recent law school graduate, having just passed the bar examination, may be elected or appointed. This concern will be reduced if the electorate supports the proposed constitutional amendment on the November ballot to require judicial candidates to have been licensed for at least five years. But even then, there will be no requirement of courtroom experience, or familiarity with the law that is under the jurisdiction of the type of court for which the candidate is running.

INFORMATION ABOUT CANDIDATES

Voters have little information about judicial candidates, whether aspirants or incumbents, that would let them make informed choices. Other than a candidate’s own campaign advertising or an opponent’s attack,
little information is available about the candidate's judicial temperament, learning in the law, diligence, and other manifestations of competence.

Some local bar associations and civic groups conduct polls and rate candidates, but candidates are not required to participate and the evaluation systems are not standard from place to place. Moreover, these groups have no authority to inquire into financial, criminal, or disciplinary records.

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It surely is not an exaggeration to say that the voters who do cast votes for judicial candidates—and they are only a fraction of the turnout, which, sadly in our democracy, is only a fraction of the registered voters, who are a not-wonderful fraction of the citizens eligible to vote—the actual voters know extraordinarily little about the candidates' qualifications. Even lawyers, who probably know more about judges than most nonlawyers, typically have only the sketchiest of information.

The consequence is that much judicial selection is based not on information but on mere name recognition (and, sometimes, misrecognition), which has almost no bearing on judicial qualifications.

The situation is somewhat better in the case of gubernatorial interim appointments, in that the governor is presented with a great deal of information about possible appointees. The State Bar Standing Committee on Judicial Qualifications makes a broad inquiry and submits its report confidentially to the governor. It appears that governors generally pay attention to such reports, but they are not required to and the information in the reports does not reach the public.

PARTISANSHIP

Between 1850 and 1938, Michigan judicial candidates appeared on partisan ballots. In 1938, the Legislature directed the removal of party designations from judicial ballots; it also permitted incumbent judges to become candidates for re-election by filing affidavits of candidacy and nominating petitions.

Although judicial elections, including those for the Supreme Court, are ostensibly nonpartisan, a Supreme Court candidate must be nominated by a political party before running on a nonpartisan ballot; and the candidate is forbidden, of course, to express to the voters his or her views about substantive issues. Although the established two parties are the source of most Supreme Court nominations, some candidates have created new political parties to gain a place on the ballot. The pretense of it all puts to shame many of the now-laughable fictions so loved by the ancient common law pleaders.
STANDING COMMITTEE ON JUDICIAL SELECTION
RECOMMENDATION

That the Representative Assembly adopt the following resolution:

"BE IT RESOLVED that the State Legislature be asked to direct, by joint resolution, the appointment of a bipartisan citizens' commission to study and report on the need, if any, to change, in whole or in part, the manner in which Michigan judges are selected.

"That the commission consist of fifteen persons chosen by the Speaker of the House of Representatives, the minority leader of the House of Representatives, the majority leader of the Senate, the minority leader of the Senate, the Governor, and the Chief Justice of the Supreme Court in such a manner as the joint resolution provides.

"That the State Legislature appropriate funds sufficient to enable the commission to discharge its responsibilities; and

"That the commission be required to report its recommendations within twelve months of its appointment."

REPORT

Michigan judges initially reach the bench by election or, in case of a mid-term vacancy, by gubernatorial appointment subject to later election. The Standing Committee on Judicial Selection has identified elements of Michigan's judicial selection processes that on occasion subvert the justice system and the citizens of this state. The following are among the most obvious and important:

- **Judicial qualifications:** There are no requirements of experience or ability.1
- **Candidate information:** Voters usually have little or no information about judicial candidates.
- **Incumbency designation:** A device intended to encourage stability in judicial tenure (usually a good thing), ballot designation as an incumbent protects good judges and inadequately judges alike.
- **Voter participation:** Of registered voters who actually vote in an election, a substantial percentage do not vote for judicial candidates.
- **Slating:** In courts with several seats to be filled in an election, nonincumbent candidates cannot target a particular seat but must run on a ballot against all of the incumbents, and the seats go to those with the highest vote totals. As a consequence, judicial elections usually fail to focus on qualifications or performance of individual incumbents and place a premium on name recognition and fund-raising ability.
- **Costs and fund-raising:** Judicial election necessitates large campaign expenditures, well beyond the personal resources of all but the wealthiest. Candidates must necessarily seek and rely on endorsements and financial commitments from interest groups and lawyers whose agendas and clients' interests may vary well come before them if they are elected.
- **Down time:** Most judicial elections involve six months of campaigning. Even though judicial terms are staggered, courts are left short-handed while one-third of the judges cannot reach the bench on the first day of their terms; over the years, such court delays can be a problem exacerbated on the Court of Appeals and the Supreme Court, where decisions require the participation of all judges on a panel or on the court.
- **Diversity:** Judicial elections do not ensure that the composition of courts reflects, in some measure, the diversity of the population that they serve.
- **Appointments to vacancies:** There is no requirement that the governor consult with a commission or similar body in filling vacancies and nothing, therefore, to prevent the appointment of an unqualified individual.
- **Accountability:** Governors and legislators are elected to be representative, to be strong champions of the preferences of their constituents. They must be accountable to the majority public opinion. In sharp contrast, it is not the role of the judge to "represent" the majority. Indeed, when questions of constitutional authority are raised, judges need to be principled enough to defy current popular opinion in favor of the long run public values expressed in the constitution.
- **Partisanship:** Party nomination of Supreme Court justices followed by ostensibly nonpartisan election breeds cynicism about the process.
- **Not since the Constitutional Convention of 1961 has there been a comprehensive review of judicial selection in Michigan. Yet during these 35 years, two-thirds of our sister states, prompted by similar concerns, have moved to selection procedures that appear to provide greater emphasis on quality and accountability.2

For all these reasons the committee recommends the appointment of a bipartisan citizens' commission to examine Michigan's system of judicial selection.

1. The November 1996 ballot will contain a proposed constitutional amendment requiring that judges have at least five years experience as a lawyer.
2. Some methods are comprehensive, others are limited to one or more court levels. Some are statewide, others limited to particular areas or subject to local option. Most provide for initial appointment by the governor and/or Legislature from a list prepared by a broadly representative commission, with the judge being required to run on his or her record in periodic retention elections. A few are an amalgam of methods.

FUND RAISING

Voter identification of a candidate is critical to winning any election. In the absence of pre-existing high-profile recognition, a candidate must mount a substantial campaign, which today translates into the extensive use of all forms of the media. The costs are great and typically exceed the resources of most candidates. Campaign funds must be acquired, and there is seldom any choice for the candidate except to become intricately involved, if only behind the scenes, in the funding efforts.

Although there are some limitations and safeguards found in election laws and ethics rules, interest groups, including political parties, are permitted to contribute substantial funds and in-kind services to the judicial candidate's campaign committee. Where the interests of a campaign contributor can be affected by the case outcome, the ability of the judge to render an impartial decision is jeopardized. Such bias could be addressed by recusal, but routine judicial disqualification on the basis of campaign contributions would be too frequent when fund raising is such an integral element of the judicial selection process.

DOWN TIME

Every two years, one-third of the state's judges below the level of the Supreme Court (where the terms are eight years) must face the electorate if they wish to continue in office. Until recently, re-election tended to be the norm, and judicial candidates did little more than announce their candidacies and then spend a few low-key weeks looking for support. Little thought was given to the electoral arena as judges aggressively protected their nonpartisanship.

Times have changed, and for a host of reasons many judges face challenges in their quest for retention. Even though judicial ethics require judicial duties to take precedence over all other activities of a judge and indeed forbid judges to under-
take activity that interferes with the performance of judicial duties, the reality is that they are forced to devote considerable time and energy every six years to their re-election campaigns. Matters before a single judge may be reassigned when the distractions of campaigning make him or her unavailable, but dockets lengthen and extra burdens are placed on the judges who are not up for re-election. The problem is especially acute at the appellate levels, where decisions are made by a panel of judges or the entire court: Decisions are held up when all participants cannot be convened.

In short, Michigan's system of judicial selection results in significant court disruption to accommodate the judges' need to campaign for re-election.

A WORD ABOUT ACCOUNTABILITY

In a democratic system, elected officials in the executive and legislative branches must be "accountable" to majority public opinion. Elections in which issues of public concern are debated and "representatives" are elected are thus essential in a representative democracy. The appropriate role of judicial officers, however, is quite different, making it inappropriate to consider whether some other method of selection and retention of judges is desirable.

Judges are not expected simply to reflect the popular will in a "representative" capacity. They are charged with the responsibility of deciding specific cases brought to them by parties, even parties not entitled to vote in elections, such as governmental entities, business entities, minors, and citizens of other states or countries. Instead of carrying out a "mandate" of the voters in a representative capacity, judges are expected to engage in fair and impartial fact-finding and then to apply the law to those facts. For the most part, the "law" is derived from the actions of the legislative and executive branches of government and from the constitutions of the state and nation. Ideally, judges decide specific cases and controversies, "making" law only interstitially, to the extent required to decide the case at bar.

Election of judges in Michigan creates a mere illusion of "accountability" to those voting in judicial elections. In addition to the difficulty most voters face in getting information about judicial candidates, the information they do get does little to help them make informed decisions, because the issues are far different from those involved in electing "representatives." As a result, special interest stakeholders—mostly frequent users of the court system and their lawyers—have disproportionate influence on the selection and retention process. That influence is obtained by providing candidates with the resources needed to buy advertising, which is essential to the name recognition required for success in today's popular judicial elections.

Michigan has a good court system. It is blessed with many excellent judges, chosen, some might say, despite rather than because of the way in which they reached the bench. But, in the standing committee's view, there undeniably are significant problems in the present methods of selection and retention that warrant a well-funded study and evaluation by a citizens' commission appointed by the leaders of the three branches of Michigan's government. If the commission's conclusion is that nothing needs to be changed, we shall have reached that position by intent and not by default. If it concludes that improvements are possible, we can, and must, set about achieving them.

Footnote


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