

BY JAMES P. SCHALLER

The Price of Electing Judges

It may be impossible to take politics out of judicial campaigns, but the reform movement is surging.

Ethics

Last summer's hearings on Priscilla Owen, a Bush administration nominee for the U.S. Court of Appeals for the 5th Circuit, have again highlighted a number of shortcomings in the manner in which this country selects its judges.

The principal issues that led to the defeat of the nomination, which centered on Justice Owen's opinions as a Texas state court judge, eclipsed another problem that affects judicial selection in many areas of the country. This is the election of judges and the influence that money can have on those elections.

Owen was asked by several Democratic members of the Senate Judiciary Committee about campaign contributions she had accepted from employees and officials of companies that later appeared before her as litigants. Her failure to recuse herself was not deemed unethical, but the line of questioning pointed out a major shortcoming of the Texas system, one that Owen herself has denounced.

It's not as if these problems have only recently been recognized. Commission after commission, study after study have decried the deleterious effects upon judicial independence of the popular election process.

There is more to come. American Bar Association President Alfred Carlton Jr. has made the issue of judicial independence a priority. To that end, he has appointed Edward Madeira Jr. of Philadelphia's Pepper Hamilton to chair a new ABA Blue-Ribbon Commission on the Judiciary in the 21st Century. The honorary co-chairs are former FBI Director and former U.S. District Judge William Sessions and former D.C. Circuit

Court Judge Abner Mikva.

Ned Madeira is a former chair of the Judiciary Committee of the American College of Trial Lawyers, which itself issued a white paper on judicial independence last year and is working on a major study of the effect of money on judicial elections.

The ABA commission will work closely with its Standing Committee on Judicial Independence, which has already published a great deal of startling data on the politicizing effects of campaigning and the threat to judicial independence.

The problems in this area would be obvious even if judges weren't theoretically subject to codes of judicial conduct, most of which follow pretty closely the canons of the ABA Model Code. The canons are broad general statements. There are only five of them in the 2002 version—all of them at odds with the realpolitik of judicial selection by popular vote.

The canons mandate that a judge shall:

- Uphold the integrity and independence of the judiciary;
- Avoid impropriety and the appearance of impropriety in all of the judge's actions;
- Perform the duties of judicial office impartially and diligently;
- So conduct the judge's extrajudicial activities as to minimize the risk of conflict with judicial obligations; and
- Refrain from inappropriate political activity.

For judges subject to election, 100 percent compliance with any of these canons is a virtual impossibility, as was no doubt understood by the Founders, who wisely provided for an all-appointed judiciary. As Alexander Hamilton put it in *The Federalist No. 78*: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution."

Still earlier, John Adams, preparing to write the

Massachusetts Constitution of 1780, stressed the need to assure the “able and impartial administration of justice” in a “government of laws, not men,” and called for separation of powers and for an all-appointed judiciary.

It was not until the Jacksonian Democrats’ “revolution” a generation later that many states were persuaded to subject their judges to the popular electoral process. This was a mistake almost immediately recognized as such, but one that has proven resistant to change.

The fact is, as Ned Madeira concedes, that many of the states cling to the notion of electing their judges. In remedying the problems that arise from that legislative choice, Madeira concedes that “one size probably won’t fit all.” The ABA can’t prescribe the perfect way to select judges—although that is pretty much what Madeira’s commission is being asked to do. The best it can do is point out that some systems seem to give rise to a great many problems, particularly systems that involve megabucks campaigns and systems in one-party cities.

But there are 30,000 state court judges in the country. And while states like Ohio, Michigan, Texas, Louisiana, and Alabama, cities like Philadelphia and Brooklyn, N.Y., and counties such as Cook County, Ill., exemplify the ills of the present system, there are many small towns and rural areas where election of judges has led to the selection of the most distinguished people in the community.

Madeira says he doubts that any state will opt for a federal-type all-appointed system, although he thinks most would probably endorse merit selection. But problems can arise even in a state like Maryland that has a merit selection system.

In Maryland, all sitting judges have to run for re-election every 15 years. The organized bar always supports retention of the sitting judges—but because political candidates can challenge them, they must also raise money. They usually undertake this activity as a group, although it is still a matter of painful embarrassment.

This year, former Assistant U.S. Attorney Thomas Eldridge has mounted a campaign against the sitting judges, with considerable success so far. Eldridge has made considerable headway by denouncing the sitting judges as soft on crime. One Maryland lawyer dubbed him “the Cheap Tricks candidate” (*The Washington Post*, Sept. 29, 2002).

As long as there are hard-fought political campaigns, powerful interests will take sides and spend money.

Jim Wootton heads the Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce, which spends a great deal of money on public education efforts in conjunction with judicial elections. Wootton believes the Constitution requires the response the Supreme Court made in *Republican Party of Minnesota v. White* earlier this year—that the First Amendment protects statements made by judicial candidates in contested elections.

Wootton says the decision “should energize us to redouble our efforts to remove judges from the rigors of the electoral process.” Most efforts to date, according to Wootton, have really been just “fingers in the dike.”

But the federal system is itself not without difficulties, Wootton says, and “the biggest danger in the current federal system is the tendency to identify judges with those who appointed them.”

Pretending that judges don’t have a political philosophy is a fiction, “but it is an enormously useful fiction,” Wootton says. “I have no quarrel with those who seek to ascertain prospective judges’ judicial philosophies, but their political leanings should be off-limits.”

As long as the system remains as at present, Wootton is determined that the business community is not going to be outspent by trial lawyers and labor unions. Massive spending on “issue ads” has become the order of the day, and as each interest group ups the ante, the effects of money and politics on judicial elections become more apparent.

If we are not indeed to have what the ABA calls “the best judges money can buy” in our state courts, where 98 percent of the nation’s legal business is carried on, this problem must be addressed and meaningful reforms implemented. There is a groundswell for reform, and Madeira’s commission is only one effort under way to achieve it. We can only hope they are more successful than their many predecessors.

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